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In The

Supreme Court of the United States

October Term, 1995

ERNEST JONES, JR.,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER MARYLAND'S PRE-TRIAL ADMINISTRATIVE PER SE DRIVER'S LICENSE SUSPENSION IS "PUNISHMENT" FOR DOUBLE JEOPARDY PURPOSES?

LIST OF INTERESTED PARTIES

The caption contains the names of all the parties below.

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OPINION BELOW

The reported opinion of the Court of Appeals of Maryland, *State v. Jones*, 340 Md. 235, 666 A.2d 128 (1995), reversing the order of dismissal of the Circuit Court for Montgomery County, Maryland, is reproduced in Appendix A (1a-35a).

STATEMENT OF JURISDICTION

The Petitioner requests that this Court grant the petition for writ of certiorari and reverse the judgment of the Court of Appeals of Maryland in *State v. Jones*, 340 Md. 235, 666 A.2d 128 (1995). The Court of Appeals decision applies the Double Jeopardy Clause of the Fifth Amendment, as applied to the states under the Fourteenth Amendment, contrarily to three decisions of this Court: *United States v. Halper*, 490 U.S. 435 (1989); *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993); and *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994). The Court has jurisdiction to consider the Double Jeopardy Clause issue pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Amendment V, provides in relevant part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

The pertinent provisions of Maryland Code Ann., Transportation Article, § 16-205.1 (1992 Repl. Vol., 1994 Cum. Supp.), are set forth in Appendix D.

STATEMENT OF THE CASE

Factual background

The Petitioner, Ernest Jones, Jr., was arrested and charged criminally with driving while intoxicated and under the influence of alcohol, in violation of Maryland Code Ann., Transp. Art., § 21-902, on April 25, 1994. During processing by police, he had submitted to a test to determine alcohol concentration with a result of .27.[1] Pursuant to Maryland Code Ann., Transp. Art., § 16-205.1., Maryland's administrative per se driver's license suspension statute, the arresting officer seized Jones' driver's license, and issued a temporary license pending Jones requesting a hearing to contest a proposed 45-day suspension of his driver's license.

Maryland Law

Since January 1, 1990, § 16-205.1 has required that offenders who provide a test result of more than .10 shall have their drivers' licenses suspended for 45 days for a first offense, and 90 days for any subsequent offense. The penalty for a refusal is 120 days for a first offense and one

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[1] Under Maryland Code Ann., Cts. & Jud. Proc. Art., § 11-103.2 (1995 Repl. Vol.), "alcohol concentration" is defined as "the number of grams of alcohol per 100 milliliters of blood" or "the number of grams of alcohol per 210 liters of breath."

year for a subsequent offense. § 16-205.1(b). Only offenders who submit to the test and who have not been suspended for or convicted of drunk driving within the previous five years are eligible for a modification of the suspension or issuance of a permit restricted for purposes of employment or alcohol education. § 16-205.1(n).

Upon determining that reasonable grounds exist to believe a driver is under the influence of alcohol or intoxicated, the police officer is required to detain the driver, advise the driver of the penalties that shall be imposed, and offer the driver the test to determine alcohol concentration. § 16-205.1(b)(2). Where the driver refuses, or submits and the result is greater than .10, the officer is required to confiscate the driver's license, issue an order of suspension and a 45-day, temporary license, and send a sworn certificate to the Motor Vehicle Administration within 72 hours indicating compliance with the statute and containing the reasonable grounds to believe the driver was driving while intoxicated or under the influence of alcohol. § 16-205.1(b)(3).

Unless the driver requests a hearing within 30 days, the applicable suspension is automatically imposed. § 16-205.1(f)(4). At a hearing, an administrative law judge (ALJ) determines whether the officer had reasonable grounds to believe the person was driving while intoxicated or under the influence of alcohol, whether the advice of rights and consent to a test was given, and whether the driver submitted to a test with a result of more than .10 or refused the test. § 16-205.1(f)(7), (8). If the required findings are made, the ALJ issues the appropriate sanction.

In a separate court proceeding, the State prosecutes offenders under Maryland Code Ann., Transp. Art., § 21-902, which prohibits drunk driving. If convicted, the defendant may be jailed and or placed on probation. Additionally, points may be assessed and a conviction noted on the drivers record which leads to yet further license suspension or revocation proceedings before the Motor Vehicle Administration under Transp. Art., §§ 16-205, 206 and 404.

Proceedings before the Maryland Office of Administrative Adjudication

On August 31, 1994, in an administrative proceeding, Jones' driver's license was suspended for 30 days, as a result of a breath test in excess of .10. An ALJ found that there were reasonable grounds to believe Jones was driving while intoxicated or under the influence of alcohol, that he had been advised of the administrative penalties that would be imposed for submitting or refusing to submit to an alcohol test, that he had agreed to take the test, and that the test result was more than .10. The ALJ also found that Jones was eligible for a modification of the mandated 45-day license suspension for a first offense of a test result of .10 or over because he needed to drive for purposes of alcohol education and employment and because he had not had a prior suspension under Maryland Code Ann., Transp. Art., § 16-205.1 or a conviction under Transp. Art., § 21-902 within the past five years.

After considering that the petitioner had two prior probations before judgment[2] for drunken driving, the ALJ denied a permit restricted for work and alcohol education purposes and imposed a 30-day suspension.

Proceedings before the District Court for Montgomery County, Maryland

On November 15, 1994, Jones was convicted of driving while intoxicated in the District Court for Montgomery County, Maryland. He was sentenced to serve one year in the Montgomery County Detention Center, with all suspended but three days, fined $800, all of which was suspended, placed on two years supervised probation, and required to obtain a restriction on his driver's license prohibiting him from driving after consuming any alcohol.

Proceedings before the Circuit Court for Montgomery County, Maryland

On *de novo* review from the conviction for driving while intoxicated in the District Court, on March 22, 1995, the Circuit Court for Montgomery County, Maryland granted the Petitioner's motion to dismiss on the ground that further prosecution would violate the multiple punishment prohibition of the Fifth Amendment Double Jeopardy Clause and the common law of Maryland.

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[2] Probation before judgment, pursuant to Maryland Code Ann., Article 27, § 641, is a disposition after a finding of guilt, suspending the verdict.

Proceedings before the Maryland Court of Appeals

The Maryland Court of Appeals granted the State's petition for a writ of certiorari, and reversed. In *State v. Jones*, 340 Md. 235, 666 A.2d 128 (1995), the Maryland Court of Appeals held that the administrative license suspension of an individual charged with drunk driving, did not constitute "punishment" so as to preclude prosecution of the drunk driving charge on double jeopardy grounds. The court determined that the suspension was rationally related to remedial purposes served by Transportation Article, § 16-205.1, even though the statute was also intended to punish and deter drunk drivers.

The *Jones* court rejected the State's assertion that the statute served solely remedial purposes as well as Jones' argument that the statute was solely punitive under *Halper*, *Austin*, and *Kurth Ranch*. Rather, the court, upon review of the historical purposes generally served by license suspensions, and the legislative history and language and structure of Maryland's administrative per se law, concluded that the law served both remedial and punitive objectives. The court rejected Jones' assertions that the severity of the suspensions imposed under the law, between 45 days and one year, the focus only on individuals arrested and charged with drunk driving, and the failure to relate the term or imposition of suspensions to a finding of unfitness of the driver required a conclusion that the suspension of Jones' license was punishment. The court also rejected the State's argument that language in prior Court of Appeals cases finding a legislative intent to protect the public required characterizing the suspension as remedial. The court agreed with Jones, to the extent the legislative history required recognizing

that the intent of the law, at least in part, was to punish and deter drunk drivers.

However, the Court of Appeals rejected Jones' argument that *Halper*, *Austin*, and *Kurth Ranch*, required the State to prove that the license suspension statute served solely remedial purposes. An amicus brief was filed by the Insurance Institute for Highway Safety (IIHS) to present statistical information relevant to the State's alleged remedial interests because, "[t]he record below is devoid of any shred of evidence on the state's interest in the remedy it seeks or the effect of that remedy." Motion for Reconsideration of Order Limiting Scope of Amicus Brief, 12. However, the State, IIHS, and another amicus curiae brief filed by Advocates for Highway and Auto Safety, all failed to proffer *any* evidence of the rate of recidivism between arrest and trial in drunk driving cases to support a remedial license suspension between arrest and trial. The court nonetheless rejected Jones' suggestion of an inverse relationship between drunken driving arrests and recidivism between arrest and trial and his argument of a lack of a rational relationship between the suspensions and any remedial objective. Instead the court stated, "[i]f the class of individuals who fail or refuse to take breath or blood tests have an increased probability of driving while intoxicated, § 16-205.1 can fairly be said to serve the remedial purpose of maintaining safety on the public highways." *Jones*, 340 Md. at 256, 666 A.2d at 138. Given the nature of the State's purpose allegedly served, maintaining safety on the highways, the court rebuffed Jones' claim that *Halper*'s two-part test involved factual issues which required affirmance of the circuit court, and Jones' claim that the State had failed to meet its burden of proof.

Jones requests the Petition for a Writ of Certiorari be granted in this case, because as is more fully set forth below, *Jones* conflicts with *Halper, Austin,* and *Kurth Ranch.* Additionally, the state appellate courts have used conflicting analyses in license suspension cases, indicating widespread disagreement by state courts over the proper interpretation and application of *Halper, Austin,* and *Kurth Ranch,* and requiring guidance from this Court.

REASONS FOR GRANTING THE WRIT

MARYLAND'S PRE-TRIAL ADMINISTRATIVE PER SE DRIVER'S LICENSE SUSPENSION IS "PUNISHMENT" FOR DOUBLE JEOPARDY PURPOSES.

I. THIS CASE IS WORTHY OF REVIEW BECAUSE *JONES* IS IN DIRECT CONFLICT WITH *HALPER, AUSTIN,* AND *KURTH RANCH.*

The judgment of the Court of Appeals that the license suspension in this case was not "punishment" for purposes of double jeopardy analysis was incorrect because the driver's license suspension statute here, unlike other arguably remedial license suspension statutes, is uniquely and specifically designed to bypass the court system, and punish and deter first offender drunk drivers who prior to the adoption of administrative per se legislation in 1989 had escaped meaningful punishment, but who in the Maryland Court of Appeal's prior considered judgment are not categorically unfit or unsafe to drive. *See, Motor Vehicle Admin. v. Mohler,* 318 Md. 219, 567 A.2d 929 (1990). Other pre and post judicial license suspension provisions arguably aimed at protecting the public from

drivers with a propensity to violate the law have been and remain in force. *E.g.*, Md. Code Ann., Transp. Art., §§ 16-113, 16-205, 16-206, 16-404-05. The legislative history of the Maryland statute reveals an overwhelming intention to use license suspension as a punishment for and deterrent to drunk driving before this Court decided *United States v. Halper*, 490 U.S. 435 (1989). *Jones'* application of *Halper*, to conclude that the administrative per se suspensions fairly serve solely remedial purposes, despite the court's recognition that the suspensions do serve punitive purposes, conflicts with *Halper*, *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), and *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994).

This Court has held that the penalty imposed in a proceeding that is considered to be "civil" in nature may nonetheless be limited by the prohibition of the Double Jeopardy Clause against multiple punishments to the extent the civil sanction is considered to be "punishment" where the civil proceeding is separate from a criminal conviction and sentence for the same offense. *Halper*. The *Halper* holding was clarified in *Austin*, where this Court reiterated that " '[a] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' " 113 S.Ct. at 2812, *quoting*, *Halper*, 409 U.S. at 448 (emphasis in *Austin*). If the defendant makes this showing, then the burden shifts to the State to prove its actual losses. *Halper*, 409 U.S. at 449-50.

In a more recent decision, *Kurth Ranch*, this Court held that where the subsequent civil penalty "taken as a

whole" serves the purpose of "punishment" and is not susceptible of division into its remedial and punitive aspects, that the Double Jeopardy Clause may bar the entire proceeding where the penalty is severe, it serves the purposes of retribution and deterrence, it is only assessed against persons arrested for a criminal offense, and it bears little relation to remedial purposes. 114 S.Ct. at 1948. Under either the *Kurth Ranch* or the *Halper-Austin* analysis, the 30 day driver's license suspension imposed by an ALJ in this case, after finding that Jones needed his license for employment and to attend his alcohol programs, constituted a punishment which required the dismissal of the drunken driving citation.

The State's contention on appeal below was that the trial court misapplied *Halper* by failing to require Jones to show that the *sole* purpose of the driver's license suspension is punishment. Brief of Petitioner, State of Maryland (Md.) at 13. The State argued, without any evidence in the record, and contrary to numerous court statements and the legislative history, that the *sole* purpose of the license suspension is remedial. Md. at 13-14. Even amicus curiae, IIHS, disagreed, arguing instead that the statute's general deterrent effect produces a decrease in alcohol related accidents. IIHS Brief at 29. Because the State's very narrow claim of error did not comport with this Court's cases and the facts, the circuit court should have been affirmed.

A. Kurth Ranch

The administrative per se suspension possesses many of the characteristics that marked the marijuana tax in

Kurth Ranch as punishment: severity of the penalty; serving the purposes of retribution and deterrence; suspension conditioned on commission of a crime and only of persons arrested; and suspension of persons not shown to be presently unfit or unsafe to drive. The suspensions are also not the least restrictive means available to accomplish the State's objectives. Moreover, there is a strong resemblance to the forfeiture provisions at issue in *Austin*, where there was a legislative history that recognized the shortcomings of the criminal justice system to adequately punish and deter drug crimes.

1. Severity of the penalty

Kurth Ranch chose to emphasize the "intrinsically personal" nature of the double jeopardy protection, and gave the "high rate of taxation" significance as one factor that supported the conclusion that the drug tax was punishment. 114 S.Ct. at 1946. Under *Kurth Ranch*, the court must look to the excessiveness of potential penalties under the statute taken as a whole, regardless of whether in individual cases, the penalty might not be that severe. *See, id.* at 1955 (O'Connor, J., dissenting).

The license suspension authorized by the administrative per se law, for example, a one year suspension for a second refusal, is extreme when one considers that a first revocation, the harshest penalty that may be imposed for a conviction of driving while intoxicated under Transp. Art., §§ 16-205 and 16-404 (which usually does not occur before a third or fourth offense) is a maximum of six months. Transp. Art., § 16-208(b). The 120-day suspension without work privileges for a first refusal is incredibly

harsh. Similarly, the 45-day suspension authorized for a first test result more than .10 should be compared with the typical suspension for a first offense conviction. As a result of probation before judgment there is usually no license suspension or revocation for a first offense of driving while intoxicated or under the influence of alcohol.

The license suspension penalty is devastating to many drivers. As the Maryland Court of Appeals recognized in *Brosan v. Cochran*, 307 Md. 662, 516 A.2d 970 (1986):

> The continued possession of a driver's license may become essential to earning a livelihood; it is, therefore, an entitlement that may not be taken away without the due process mandated by the Fourteenth Amendment. *Sites* [*v. State*], *supra* [300 Md. 702], at 717, 481 A.2d 192 [,199-200 (1984)], *citing Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). *Sites* further makes clear that *revocation of a driver's license may burden the ordinary driver as much or more than the traditional criminal sanctions of fine or imprisonment.*

Id. at 672, 516 A.2d at 975 (emphasis added).

In Jones' case, he was suspended for 30 days despite a finding that he needed his license for employment purposes and for alcohol education and treatment. The administrative per se license suspension certainly meets *Kurth Ranch*'s first prong.

2. Retribution and deterrence

Jones recognized the retributive and deterrent purposes served by the statute. *Jones*, 340 Md. at 262, 666 A.2d at 141. This conclusion was inescapable given the extensive legislative history, which reflects a frustration with the criminal process in effectively addressing the drunk driving problem, and in the desire for a "swift and sure" penalty. According to the Task Force on Drunk and Drugged Driving:[3]

> It should be emphasized that this proposal establishes an administrative process and penalty that is separate and distinct from any criminal process and penalty. That is, the imposition of the administrative penalty of license suspension is not dependent on a finding of guilt by a court.
>
> It is argued by proponents of an administrative per se offense that the suspension of a driver's license is accomplished more readily through an administrative process than through the already overburdened criminal justice process and, further, that the administrative process generally provides a *sure penalty*. Conviction of an offense in court, it is argued, is never assured, and even if the driver is ultimately convicted, the penalty is subject to a degree of judicial discretion.

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[3] The Task Force on Drunk and Drugged Driving was established by a joint resolution of the Maryland legislature in 1988. The Task Force's recommendations, contained in a report titled, *General Assembly of Maryland Report of the Task Force on Drunk and Drugged Driving, 1988 Interim*, led to the enactment of the administrative per se law.

> For these reasons, proponents claim that administrative per se is an *effective deterrent to drunk driving because the public perceives that drunk drivers are more likely to suffer a swift and sure penalty* (loss of license) under an administrative per se statute than under a system which ties the penalty only to a criminal conviction.

General Assembly of Maryland Report of the Task Force on Drunk and Drugged Driving, 1988 Interim, (Task Force) at 11-12 (emphasis added).

The Task Force also referred in its study to the availability of federal grant money if the administrative per se legislation were enacted. Task Force at 7. 23 U.S.C. §§ 408 and 410 were promulgated by the Congress in 1982 and 1988, respectively, amongst numerous comments in the Congressional Record reflecting the need to further punish and deter drunk driving. *See, e.g.,* 128 Congressional Record 25966 (1982) (statement of Mr. Howard that "the main aim of the bill is deterrence [and] [p]unishment is justified after the fact"); 128 Cong. Rec. 25968 (1982) (statement of Mr. Young that the federal funds will deter drunk driving by utilizing "swift and sure arrest, conviction, [and] punishment"); 128 Cong. Rec. 25971 (1982) (statement of Mr. Ratchford that states will be encouraged to "punish . . . drunk drivers"). These comments and the comments by proponents in Maryland's legislative history are almost identical to the legislative history relied upon by the Supreme Court in *Austin,* 113 S.Ct. at 2811, to conclude that the forfeitures at issue there served no legitimate remedial purpose. As in *Kurth Ranch,* the deterrent purpose of § 16-205.1 is "beyond question." 114 S.Ct. at 1946.

3. Suspension conditioned on commission of a crime

A characteristic of a statute intended to punish individuals for commission of a crime is that only individuals arrested and charged with the crime are subject to the penalty. *Kurth Ranch*, 114 S.Ct. at 1947. The reasonable grounds to believe that the driver has been driving while intoxicated or under the influence of alcohol requires the detention under § 16-205.1, and generates the administrative proceeding where the suspension is imposed. Reasonable grounds to believe the driver was driving while under the influence of alcohol or while intoxicated is a required finding under § 16-205.1(f)(8). Drunk drivers who are not arrested and charged with driving while intoxicated and under the influence of alcohol are not subject to the license suspension.

The *Jones* court found this element not to be important in the context of license suspension statutes because, unlike the tax in *Kurth Ranch*, license suspensions are traditionally imposed after the commission of crimes. 340 Md. at 255, 666 A.2d at 137. However, under Maryland law, the administrative per se license suspension is the *only* pre-trial driver's license suspension authorized for commission of a crime for a driver who has no impediment on their license, such as a restriction, suspension, or revocation of driving privileges, for whom there is no evidence of a medical affliction relevant to safeness or fitness to drive, or who fails to meet insurance requirements. Additionally, other license suspension statutes require an explicit or implicit finding that the licensee has a character trait which is inconsistent with continued

licensing. *See, e.g.*, Maryland Rule 1230, Rules of Professional Conduct, Rule 8.4(b) (making it unprofessional conduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects"). In contrast, the administrative per se driver's license suspension is imposed without a finding that the licensee is unsafe to drive and the license is restored without a finding that the licensee is fit. The *Jones* court thus placed undue emphasis on the traditional nature of license suspensions as remedial in direct contradiction to "*Halper*'s unequivocal statement that labels do not control in a double jeopardy inquiry." *Kurth Ranch*, 114 S.Ct. at 1946.

4. Suspension of persons not shown to be presently unfit or unsafe to drive

The final factor identified by this Court in *Kurth Ranch* was the taxation of confiscated property. 114 S.Ct. at 1948. Here an analogous characteristic of the administrative per se suspension is the license suspension of persons not shown to be presently unfit or unsafe to drive, the suspension's lack of a demonstrated remedial effect.

The State argues that the actual purpose of § 16-205.1 is to physically remove drunk drivers from the roads by taking their licenses. By arguing thus the State concedes that there is no issue of reimbursement of costs, the only form of remedial sanction recognized in *Halper*. As in both *Austin*, 113 S.Ct. at 2812, and *Kurth Ranch*, 114 S.Ct. at 1948, the penalty bears no relation to the State's damages. The State is in effect arguing that the driver's

license is an "instrumentality" of crime. The Supreme Court also rejected that approach in *Austin*, conceding only that the forfeiture of contraband might be characterized as remedial. A driver's license is not contraband.

A simple comparison of the statute before and after 1990, as well as a review of its legislative history, makes it crystalline that the primary class of drivers affected by and intended to be affected by the administrative per se law were first offenders who submit to the test. All others, subsequent offenders ineligible for probation before judgment, persons who refused the test, and known alcohol abusers who began to drink were already, and still are, subject to license suspension and revocation at the Motor Vehicle Administration before, as well as after, conviction. A finding that the administrative per se statute is remedial, when it classifies all offenders subject to suspension, regardless of present unsafeness,[4] is completely contrary to the holdings in *Halper*, *Austin*, and *Kurth Ranch*.

As for subsequent offenders, many, if not most, recidivists get into alcohol treatment programs and attend alcoholics anonymous meetings conscientiously immediately after an arrest which occurs during a "slip"

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[4] Although the legislative intent appears to be to hold a prompt hearing, *see*, *Motor Vehicle Admin. v. Shrader*, 324 Md. 454, 597 A.2d 939 (1991), in practice, as in Jones' case, not only was the suspension hearing months after his arrest, but evidence was presented to show that he was not presently unsafe, that he was attending an alcohol treatment program. Moreover, the ALJ made a finding that Jones needed his license to attend the alcohol program. In refusal cases, and in the case of second offenders who submit to the test, such evidence is irrelevant, because no modification of the suspension is allowed.

from sobriety. Those drivers are sober during the period of suspension, which often, as in this case, takes place a number of months after the arrest. It cannot seriously be argued that the removal of sober drivers from the roads is remedial.

It is more likely any remedial aspect of the statute pertains to the small minority of drivers who either deliberately disregard the law and continue to drink and drive despite an arrest or who are so desperately addicted to alcohol, that no amount of jailing or treatment can keep them sober. Ironically, these individuals, the ones who should be targeted by a truly remedial statute, are the most likely to continue driving despite a license suspension. If the statute in fact serves any remedial purpose for a minority of arrestees, as to the vast majority of offenders the statute is incredibly overbroad.[5] Overbreadth is not being urged here as a theory of defense as the *Jones* court believed. *Jones*, 340 Md. at 255, n.3, 666 A.2d at 138, n.3. Rather, overbreadth here is evidence of a legislative intent to punish.

The statute also fails to employ the least restrictive means to accomplish its objectives. This factor was recognized as a characteristic of punishment in *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) and *Halper*, 490 U.S. at

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[5] Amicus IIHS concedes this in its brief. "Most alcohol related crashes do not involve repeat offenders. Less than five percent of alcohol-related crashes involve a driver who was arrested for alcohol impaired driving in the *previous* year." IIHS Brief at 5. (Emphasis added). Still, there is *no* evidence of the rate of recidivism the *same* year, the year during which the so-called remedial driver's license suspension takes place.

448-49. Less restrictive means available and used by the State to prevent drunk driving include Guardian Interlock (a driver must submit to a breath test for alcohol with negative results to start his or her car), Alcoholics Anonymous meetings, counseling, home detention, random urinalysis, close supervision and monitoring, and alcohol education and treatment. Screening is routinely done by courts and private organizations to determine if an individual has an alcohol problem which requires immediate attention or intervention. Many offenders are classified as social drinkers and pose no threat to public safety between arrest and trial, if given sufficient education. *See, e.g., Motor Vehicle Admin. v. Mohler*, 318 Md. 219, 567 A.2d 929 (1990) (a single conviction of driving while intoxicated does not make an individual per se unfit or unsafe to drive at the time of the administrative hearing).

The difference between punitive and remedial sanctions is well illustrated by contempt cases. Civil contempt is remedial, because the contemnor may purge the contempt. *State v. Roll*, 267 Md. 714, 728, 298 A.2d 867, 876 (1973). A certain term of incarceration is punishment. *Id.* Unlike civil contempt, not only can the § 16-205.1 suspension not be purged by evidence the driver is currently safe, i.e., conscientiously abstaining from alcohol and attending classes, as to the mandatory penalties required when an individual produces a second test result of more than .10 or refuses the test, such evidence is *irrelevant*. *See, Kurth Ranch*, 114 S.Ct. at 1948 (absence of relation between the penalty and damages).

In Jones' case, the untenability of the State's argument is highlighted. After finding that Jones needed his

license for purposes of alcohol education, the ALJ suspended his license for 30 days, *without* permitting him to drive to treatment, modifying the maximum suspension of 45 days. It is suggested that a sanction that presumptively prevents the driver from receiving needed treatment and education for 30 days and then lets him loose on the roadways is remedial. Moreover, the ALJ, according to the State's theory of a truly remedial sanction, implicitly decided that Jones, some four months after his arrest, would be unsafe for 30 days and that then, magically, would be safe for the next 15 days. The reduction of penalty shows that the ALJ did not consider Jones to be presently unsafe. Rather the 30 days straight suspension was a punishment because Jones' had had previous probations before judgment for drunken driving.

The *Jones* decision is the product of necessity, a desperate attempt to avoid the clear mandate of *Halper*, *Austin*, and *Kurth Ranch*, which blind sided the State and put the current administrative per se scheme, which was conceived prior to those cases, in jeopardy. As one appellate judge has said, the argument that the suspensions are remedial, and not punishment, is a "mantra" that "has to be disregarded if we are to remain honest with our citizens." *State v. Hanson*, 532 N.W.2d 598, 604 (Minn. App. 1995) (Randall, J., concurring) (agreeing that administrative per se license suspension at issue was punishment). *Kurth Ranch* required affirmance of the circuit court below.

B. Halper-Austin

Under *Halper-Austin*, if applicable, the State should have fared no better. Given the abundance of authority supporting the retributive and deterrent purposes of § 16-205.1, the statute's focus, as in *Austin*, on an individual's guilt, 113 S.Ct. at 2808-10, and the failure of the State to use the least restrictive means to accomplish its asserted remedial objectives, the circuit court's legal conclusion under *Halper*'s first prong that the penalty imposed served the purpose of retribution or deterrence, at least in part, is unassailable. Moreover, as to the State's burden under a *Halper-Austin* analysis, as in *Kurth Ranch*, the State has utterly failed to produce any evidence from which the lower court could have concluded that Jones' license suspension, which effectively denied him access to work and alcohol treatment, was at all remedial. As amicus IIHS aptly stated, "[t]he record below is devoid of any shred of evidence on the state's interest in the remedy it seeks or the effect of that remedy." Motion for Reconsideration of Order Limiting Scope of Amicus Brief, 12. Since the civil proceeding *preceded* the criminal proceeding, if the defendant has been punished *to any extent*, the double jeopardy protection would preclude a subsequent prosecution for driving while intoxicated.

In the absence of *any* evidence from the State to show that Jones' suspension was remedial,[6] the circuit court

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[6] Some courts have referred to a remedial purpose in removing drunk drivers from the roads between arrest and trial. *E.g., Johnson v. State*, 95 Md.App. 561, 570, 622 A.2d 199, 204 (1993). The State has not produced reliable evidence of a high rate of recidivism, or *any* rate of recidivism in drunk driving

could not have been clearly erroneous. *See, Riddick v. State*, 319 Md. 180, 571 A.2d 1239 (1990). The *Jones* court held, in direct contradiction to *Halper* and *Austin*, that "no factual issue is presented for which we must remand or defer to the trial court." 340 Md. at 266, 666 A.2d at 143. If those cases require a two-part analysis, Jones clearly met his burden by demonstrating that the statute served the purposes of punishment, at least in part, a conclusion accepted by the *Jones* court. Under *Halper*, the State then bears the burden of demonstrating its remedial objectives alone justify the ends. The Court of Appeals held that the State was relieved of this responsibility because unlike *Halper*, there were no case specific damages suffered by the government. If the court was correct, then it erred by failing to recognize that under *Halper* and *Austin*, the rational relationship test is the converse of a sanction that serves, in part, the purposes of punishment. *Halper*, 490 U.S. at 449 (equating "no rational relation to the goal of compensating government for its loss" and "appear[ing] to qualify as 'punishment' in the plain meaning of the word"). This Court made that point clear in *Austin*, when it said, " '[a] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' " 113 S.Ct. at 2812, *quoting*, *Halper*, 409 U.S. at 448 (emphasis in *Austin*).

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cases between arrest and trial. In addition, the widely varying, but certain, suspensions of 45 days, 90 days, 120 days and one year bear no relation to the time between arrest and trial.

As in *Austin* and *Kurth Ranch*, and as is more fully argued above, *see*, § I.A.4., the relationship, if any, between the administrative per se suspension and its remedial goals is purely coincidental. Therefore, the only conclusion consistent with *Halper* and *Austin* is that Jones' license suspension was a punishment.

For these reasons, *Jones* directly conflicts with *Halper*, *Austin*, and *Kurth Ranch*.

II. THIS CASE IS WORTHY OF REVIEW BECAUSE THE LOWER COURTS ARE IN COMPLETE CONFUSION AS TO HOW TO APPLY *HALPER*, *AUSTIN*, AND *KURTH RANCH* TO A PRETRIAL DRIVER'S LICENSE SUSPENSION FOR DRUNK DRIVING.

Halper, *Austin*, and *Kurth Ranch*, have generated a wave of litigation in the jurisdictions that have administrative per se laws similar to Maryland's.[7] At the appellate level, post *Kurth Ranch*, the defense has been successful. *State v. Gustafson*, No. 94 C.A. 232, 1995 WL 387619 (Ohio App. June 27, 1995) (affirming drunk driving dismissal).

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[7] At the trial court level, the defense has been accepted in at least 24 states. *See, Drunk Driving Defense Okayed By U.S. Court*, Lawyer's Weekly USA, September 25, 1995, at 14. These laws, providing for driver's license suspension of an individual who submits to a breath alcohol test with a result of more than .10, appear to have a common source. 23 U.S.C. §§ 408 and 410 provide for allocation of federal grant money to states that have an administrative per se law meeting certain requirements.

However, other jurisdictions have rejected the defense, post *Kurth Ranch*, for a number of different reasons. *E.g., Snow v. Superior Court*, No. 1CA-SA 95-0102, 1995 WL 332263 (Ariz.App. Jun. 6, 1995); *State v. Savard*, 659 A.2d 1265 (Me. 1995); *Davidson v. Mackinnon*, 656 So.2d 223 (Fla.App. 1995); *State v. Higa*, 897 P.2d 928 (Haw. 1995); *State v. Young*, 530 N.W.2d 269 (Neb.App. 1995).[8] These cases reflect a refusal to recognize that the law regarding double jeopardy has changed significantly in the last six years. However, even the courts rejecting the defense have been unable to agree on the appropriate legal framework or on the proper application of the facts to the chosen framework.

Some courts have concluded that since *Kurth Ranch* was a tax case, that it has no bearing on a driver's license suspension case. *E.g., Snow*. Other reported decisions have concluded that *Kurth Ranch* controls the driver's license suspension situation. *E.g., State v. Ackrouche*, 650 N.E.2d 535 (Ohio Mun. 1995); *Murphy v. Commonwealth*, 896 F.Supp. 577 (D.Va. 1995).

Some reported decisions have relied exclusively on *Halper* and *Austin*. Of those cases, some have equated the rational relationship test with a rational basis type of test. *E.g., Jones*. Some courts have expressly rejected the oft quoted language in *Halper* and *Austin* that any sanction that serves the purposes of punishment in part, is "punishment." *Austin*, 113 S.Ct. at 2812, *quoting, Halper*, 409 U.S. at 448; *e.g. Tench v. Commonwealth*, 462 S.E.2d 922

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[8] *See also Will Drunk Driving Defense Be Rejected? Experts say: Wait for Federal Courts*, Lawyer's Weekly USA, December 4, 1995, at 1 (surveying appellate decisions).

(Va.App. 1995). Other courts, primarily in federal civil forfeiture cases, have followed *Austin* in the context of double jeopardy. *E.g., United States v. $405,089.23 in United States Currency*, 33 F.3d 1210 (9th Cir. 1994), *amended on denial of reh'g en banc*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346); *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-345); *United States v. Perez*, No. 94-60788, 1995 WL 689385 (5th Cir., Nov. 21, 1995).

The lower courts have also come to widely differing conclusions about the nature of license suspension. Some of the opinions are obviously flawed. For example, the first Maryland case to address the issue here, which was prior to *Austin* and *Kurth Ranch*, apparently concluded that the effective deterrent aspect of the administrative per se law is remedial. *Johnson*, 95 Md.App. 561, 572, 622 A.2d 199, 205 (1993). It is not. *Halper*, 409 U.S. at 448-49. *Young* and *Higa* also suffer from this very significant defect. Some cases suffer from a stubborn adherence to the traditional nature of license suspensions as remedial. *Savard; Davidson; Higa*. Many courts have concluded that license suspension statutes serve solely remedial purposes. *E.g., Young; Higa; State v. Toyomura*, 904 P.2d 893 (Haw. 1995). Some courts have managed to conclude that administrative per se statutes serve neither remedial nor punitive purposes. *E.g., Ellis v. Pierce*, 282 Cal.Rptr. 93, 95 (Cal.App.1991); *Freeman v. State*, 611 So.2d 1260, 1261 (Fla.App.1992), *cert. denied*, ___ U.S ___, 114 S.Ct. 415 (1993). Some cases, like *Jones*, admit that the administrative per se statute serves punitive purposes, but rely on

the alleged rational relationship between license suspension and highway safety to find that the suspension imposed is not a "punishment." *E.g., Hanson*. Other courts have concluded that an administrative per se law is primarily punitive, and therefore punishment under *Kurth Ranch, e.g., Akrouche,* or that the double jeopardy defense appears meritorious under either *Halper* and *Austin* or *Kurth Ranch*. *Murphy*.

The wide range of views betrays a collective state of confusion in the lower courts regarding the issue presented here. The cases rejecting the defense, although differing in analyses, manage to reach the same desired result, preservation of the status quo. To a large extent, these opinions accept uncritically the state's argument that a rational relationship between license suspensions and public safety exists without a scintilla of evidence of a high rate of recidivism, or even *any* rate of recidivism, between drunken driving arrests and trials. What is clear is that this Court's guidance is needed to clarify the law regarding multiple punishment, and to eliminate the ambiguities created by state courts that appear to be unwilling to follow this Court's decisions in *Halper, Austin,* and *Kurth Ranch*.

CONCLUSION

For the reasons set forth herein, the Petitioner requests this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

STATE of Maryland

v.

Ernest JONES, Jr.

No. 42, Sept. Term, 1995.

Court of Appeals of Maryland.

340 Md. 235, 666 A.2d 128

Oct. 16, 1995.

Argued before MURPHY, C.J., and ELDRIDGE, RODOWSKY, CHASANOW, KARWACKI, BELL and RAKER, JJ.

MURPHY, Chief Judge.

In this appeal, we must determine whether administrative suspension of a driver's license under Maryland Code (1977, 1992 Repl.Vol., 1994 Cum.Supp.) § 16-205.1 of the Transportation Article constitutes "punishment" within the ambit of the United States Constitution's Double Jeopardy Clause or Maryland common law, thereby precluding the State from bringing a subsequent prosecution for the crime of driving while intoxicated. We hold that a temporary suspension of a driver's license under § 16-205.1 does not constitute "punishment" under the law of double jeopardy.

I

A

Section 16-205.1 of the Transportation Article provides for the temporary suspension of a driver's license if a driver who is under reasonable suspicion of driving while intoxicated or under the influence of alcohol either

(a) refuses to take a breath or blood test to determine the alcohol concentration of his or her blood or (b) takes a test and has a blood alcohol concentration ("BAC") of 0.10 or more. § 16-205.1(a), (b). If the driver refuses to take a test, his or her driver's license is suspended for 120 days for a first offense and one year for a subsequent offense. § 16-201.1(b)(1)(i)(2). If the driver takes the test and has a BAC above 0.10, his or her driver's license is suspended for 45 days for a first offense or 90 days for a subsequent offense. § 16-205.1(b)(1)(i)(1). The driver may request an administrative hearing. § 16-205.1(f). At this hearing, an administrative law judge (ALJ) may modify the suspension or issue a restricted license if the driver did not refuse to take a test, has not had a license suspended under § 16-205.1 in the past five years, has not been convicted of driving while intoxicated in the past five years, and is required to drive in order to work or to attend an alcohol treatment program. § 16-205.1(n).

B

On April 25, 1994, Ernest Jones, Jr. was arrested on the charge of driving while intoxicated. A breath test taken shortly after his arrest and with his consent determined that his BAC was 0.27. On August 31, 1994, an ALJ suspended Jones's license for 30 days pursuant to § 16-205.1. The ALJ modified the maximum 45 day suspension after finding that Jones needed to drive for purposes of alcohol education and employment and because Jones had no prior convictions for driving while intoxicated. After considering that Jones previously had received probation before judgement twice for driving

while intoxicated, the ALJ declined to issue Jones a permit restricted to work and alcohol education purposes and imposed a straight 30-day suspension.

In a trial before the District Court sitting in Montgomery County on November 15, 1994, Jones was found guilty of driving while intoxicated. Jones appealed to the Circuit Court for Montgomery County, where he filed a motion to dismiss the prosecution contending that to prosecute him for driving while intoxicated after his driver's license had already been suspended for the same reason constituted double jeopardy. The circuit court (McKenna, J.) agreed and dismissed the prosecution against Jones. The State contends before us that the administrative suspension of Jones's license to drive does not bar a subsequent prosecution of Jones for driving while intoxicated.

II

A

The Fifth Amendment to the United States Constitution provides, in part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Its protection against double jeopardy applies to the states via the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794-96, 89 S.Ct. 2056, 2062-64, 23 L.Ed.2d 707 (1969). Specifically, it "protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487 (1989). Since neither

party contends that the administrative suspension of Jones's license constituted a "prosecution," the imposition of criminal sanctions against Jones for driving while intoxicated violates the Double Jeopardy Clause only if it constitutes a second punishment. Of course, to be subjected to a second punishment requires the imposition of a first punishment. Therefore, prosecuting Jones for driving while intoxicated only puts him in jeopardy a second time if the suspension of Jones's license under § 16-205.1 constituted a "punishment" within the meaning of the Double Jeopardy Clause.

Under our prior cases, § 16-205.1 was not understood as imposing "punishment." In those decisions, we focused on whether the proceeding was criminal or civil in nature. If civil in nature, the proceedings would not have implicated the Double Jeopardy Clause. *Attorney Griev. Comm'n v. Andresen*, 281 Md. 152, 155, 379 A.2d 159 (1965) ("In order for the double jeopardy provisions of the Fifth Amendment . . . to be applicable, it would be necessary for this to be a criminal proceeding."); *see In re John P.*, 311 Md. 700, 537 A.2d 263 (1988) (finding that proceedings resulting in loss of visitation rights or custody of child were civil in nature and were not double jeopardy); *Attorney Griev. Comm'n v. Brown*, 308 Md. 219, 223, 517 A.2d 1111 (1986) (holding that lawyer's double jeopardy claim was "inapposite, because lawyer discipline proceedings are not criminal proceedings"). Under this mode of analysis, § 16-205.1 would not constitute a "punishment" within the meaning of the Double Jeopardy Clause.

Since 1989, however, the Supreme Court has revised its test for determining when "punishment" is inflicted

under the Double Jeopardy Clause. In the court below and in his brief to this Court, Jones argues that three recent Supreme Court decisions mandate the circuit court's finding that § 16-205.1 imposes "punishment." These cases are *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), *Austin v. United States*, ___ U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), and *Department of Revenue of Montana v. Kurth Ranch*, ___ U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994). This appeal presents the first occasion where we directly address a Fifth Amendment double jeopardy challenge to a civil sanction since the Supreme Court decided *Kurth Ranch*. For this reason, and because both parties raise different contentions as to the mode of analysis used by the Supreme Court in these three cases, it is necessary to examine each of the cases in some detail.

In *Halper*, the Supreme Court held that a civil penalty imposed upon Halper as a result of his violation of the False Claims Act, 31 U.S.C. §§ 3729-3731, constituted "punishment" to the extent that the penalty exceeded the government's loss and actual costs in enforcing the act. *Halper, supra*, 490 U.S. at 447-52, 109 S.Ct. at 1901-04. Halper was convicted of 65 separate violations of the criminal false claims statute, 18 U.S.C. § 287, each involving a demand for $12 in reimbursement for medical services worth only $3. *Id.* at 437, 109 S.Ct. at 1895-96. After Halper was incarcerated and fined under the criminal statute, the government sought to hold Halper additionally liable for a $2,000 civil penalty for each of the 65 violations. *Id.* at 438, 109 S.Ct. at 1896. In contrast to this $130,000 penalty, the government's direct loss was $585, and its expenses in prosecuting and investigating Halper

were estimated by the trial court at $16,000. *Id.* at 437, 452, 109 S.Ct. at 1895-96, 1903-04.

The government first argued that the Double Jeopardy Clause did not apply because the proceedings were civil in nature. *Id.* at 446-47, 109 S.Ct. at 1900-01. The Court found that "the labels 'criminal' and 'civil' are not of paramount importance," and "the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *Id.* at 448, 109 S.Ct. at 1901.

The Court next dealt with the contention that the civil liability imposed on Halper was not punishment because its purpose was to provide a remedy for the government's costs of investigating and prosecuting false claims. *Id.* at 448-49, 109 S.Ct. at 1901-02. Noting that "punishment serves the twin aims of retribution and deterrence," *Id.* at 448, 109 S.Ct. at 1901, the Court stated that " '[r]etribution and deterrence are not legitimate nonpunitive governmental objectives.' " *Id.* (*quoting Bell v. Wolfish*, 441 U.S. 520, 539 n. 20, 99 S.Ct. 1861, 1874 n. 20, 60 L.Ed.2d 447 (1979)). Therefore, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Id.* The Court relied upon the " 'tremendous disparity' between the Government's actual damages and the civil penalty authorized by the Act" in holding that the $130,000 liability could not be fairly seen as solely remedial. *Id.* at 452, 109 S.Ct. at 1903-04.

The rule in *Halper*, however, does not require an exact balancing of a law's remedial purpose. *Id.* at 449, 109 S.Ct. at 1902 ("We acknowledge that this inquiry will not be an exact pursuit."). The Court noted that "the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice." *Id.* The focus is upon whether the statute may be "fairly" said to be remedial, *id.* at 448, 109 S.Ct. at 1901-02, or whether the civil penalty bears a "rational relation" to the government's remedial goal. *Id.* at 449, 109 S.Ct. at 1902. Therefore, *Halper* announced "a rule for the rare case," and stated that "[t]he rule is one of reason." *Id.* Although *Halper* specifically addressed the remedial and punitive nature of civil fines, its actual holding was phrased in more general terms:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. at 448-49, 109 S.Ct. at 1902.

In *Austin*, the Supreme Court held that the Eighth Amendment's Excessive Fines Clause should be applied to in rem civil forfeiture proceedings. *Austin, supra*, ___ U.S. at ___, 113 S.Ct. at 2812. The Court determined that such procedures must comport with the requirements of the Eighth Amendment because they impose "punishment." *Id.* In making this finding, the Supreme Court used *Halper*'s definition of "punishment" under the Double Jeopardy Clause to define "punishment" for purposes

of the Eighth Amendment. *Id.* at ___, ___-___, 113 S.Ct. at 2806, 2811-12. The Court stated that "[w]e need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that [the forfeiture] can only be explained as serving in part to punish." *Id.* at ___, 113 S.Ct. at 2806.

In determining the purposes served by civil forfeitures, the Court first looked at the historical uses of forfeitures, finding that "forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment." *Id.* at ___, 113 S.Ct. at 2810. The Court then turned to the specific forfeiture provisions at issue, and found "nothing in these provisions or their legislative history to contradict the historical understanding of forfeiture as punishment." *Id.*

In examining the provisions at issue, the Court specifically noted provisions in the forfeiture statute focusing on the culpability of the property owner, such as an "innocent owner" defense and tying the forfeiture directly to the commission of a drug offense. *Id.* at ___, 113 S.Ct. at 2810-11. The Court also used the legislative history to demonstrate that the civil forfeiture provisions were punitive in nature, and that Congress had passed them after finding that traditional sanctions were inadequate. *Id.* Finally, the Court rejected the government's argument that the sanctions were remedial, finding that the forfeited property was not itself dangerous and that there was no connection between the amount recovered via civil forfeiture and the government's costs in enforcing the drug laws. *Id.* at ___, 113 S.Ct. at 2811-12.

In finding that the civil forfeiture law constituted "punishment" the Court re-stated *Halper*'s holding that " '[a] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' " *Id.* at ___, 113 S.Ct. at 2812 (*quoting Halper, supra*, 490 U.S. at 448, 109 S.Ct. at 1901-02) (emphasis in *Austin*). Thus, "[i]n light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood these provisions as serving to deter and to punish, we cannot conclude that forfeiture under [these provisions] serves solely a remedial purpose." *Id.*

In *Kurth Ranch*, the Court held that a "tax" on illegal drugs imposed after those drugs were seized by law enforcement and taxing the drugs at more than eight times their market value imposed "punishment" under the Double Jeopardy Clause. *Kurth Ranch, supra*, ___ U.S. at ___, 114 S.Ct. at 1948. In that case, six members of the Kurth family were arrested and convicted for cultivating marijuana on the family farm. *Id.* at ___, 114 S.Ct. at 1942. The family also settled a civil forfeiture action with the county attorney, agreeing to forfeit $18,016.93 in cash and equipment. *Id.* In a third proceeding, the Montana Department of Revenue sought to collect almost $900,000 in taxes on the confiscated marijuana, hash tar, and hash oil. *Id.* at ___, 114 S.Ct. at 1942-43. The Kurths filed a petition for bankruptcy, and the Bankruptcy Court determined that Montana's Dangerous Drug Tax Act authorized an assessment of $181,000 against the Kurths, but

that this assessment constituted double jeopardy. *Id.* at ___, 114 S.Ct. at 1943.

The Supreme Court agreed that the drug tax was a second "punishment" that was forbidden by the Double Jeopardy Clause. In finding that the tax was imposed as punishment, the Court noted that "while a high tax rate and deterrent purpose lend support to the characterization of the drug tax as punishment, these features, in and of themselves, do not necessarily render the tax punitive." *Id.* at ___, 114 S.Ct. at 1947. The Court rested its holding on two main conditions. First, the Court noted that "this so-called tax is conditioned on the commission of a crime. That condition is 'significant of penal and prohibitory intent rather than the gathering of revenue.' " *Id.* (*quoting United States v. Constantine*, 296 U.S. 287, 295, 56 S.Ct. 223, 227, 80 L.Ed. 233 (1935)). Second, although the tax "purports to be a species of property tax . . . it is levied on goods that the taxpayer neither owns nor possesses when the tax is imposed." *Id.* at ___, 114 S.Ct. at 1948. Based upon these factors, the Court found that "[t]aken as a whole, this drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." *Id.*

The Court declined to find that the tax statute had a remedial purpose because "tax statutes serve a purpose quite different from civil penalties, and *Halper*'s method of determining whether the exaction was remedial or punitive 'simply does not work in the case of a tax statute.' " *Id.* (*quoting Kurth Ranch, supra,* ___ U.S. at ___,

114 S.Ct. at 1950 (Rehnquist, C.J., dissenting)). In addition, Montana presented no claim that its assessment "even remotely approximates the cost of investigating, apprehending, and prosecuting the Kurths, or that it roughly relates to any actual damages that they caused the State." *Id.*

B

The State and Jones raise conflicting contentions as to the proper application of *Halper*, *Austin*, and *Kurth Ranch*. The State argues that *Halper* provides the relevant test, that *Austin*, as an Eighth Amendment decision, is inapplicable to the instant case, and that *Kurth Ranch* is a narrow decision that is limited to tax cases. Consequently, the State argues that *Halper* applies, and § 16-205.1 is only "punishment" if the defendant can demonstrate that it was imposed solely for punishment.

Relying heavily on the opinions of those dissenting in *Kurth Ranch*, Jones argues that *Kurth Ranch* has dramatically expanded the reach of the double jeopardy clause. He also argues that *Kurth Ranch* applies here because the suspension is conditioned on the commission of a crime, because the legislature had punishment in mind when it passed the statute, and because the license suspension cannot be neatly divided between its possible punitive and remedial goals. Finally, Jones argues that § 16-205.1 does not further the remedial goal of removing unsafe drivers from the road. As a result, Jones argues that the suspension of his license cannot be justified solely as remedial, and that it can only be described as "punishment."

In our opinion, neither party's contentions are entirely correct. *Halper*, *Austin*, and *Kurth Ranch* are all relevant authority for the determination we must make. We note, however, that *Halper* and *Kurth Ranch*, the two decisions dealing with the Double Jeopardy Clause, dealt with governmental overreaching on a scale which is simply not present in this case. The 30-day driver's license suspension to which Jones was subjected is in no way as severe as the $130,000 fine at issue in *Halper* or the drug "tax" imposed on illegal goods at eight times their "market" value at issue in *Kurth Ranch*. *Halper*, *supra*, 490 U.S. at 438, 109 S.Ct. at 1896; *Kurth Ranch*, *supra*, ___ U.S. at ___, 114 S.Ct. at 1942-43. Whatever its ills, § 16-205.1 obviously does not present an abuse of governmental authority of the magnitude presented in *Halper* or *Kurth Ranch*.

Although the severity of the sanction imposed by § 16-205.1 is one element in the balance that we must ultimately draw, the Supreme Court's "punishment" analysis goes beyond the severity of the imposed sanction. While *Halper*, *Austin*, and *Kurth Ranch* do not provide a tidy formulaic approach through which a result may be obtained by simply plugging in relevant facts, they provide the means by which we must analyze the issue before us. Our analysis begins as mandated in *Halper*: "the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *Halper*, *supra*, 490 U.S. at 448, 109 S.Ct. at 1901-02. *Halper* conducted this particularized assessment for civil fines, *Austin* conducted such an assessment for civil in rem

forfeitures, and *Kurth Ranch* conducted such an assessment for a "drug tax." Here, we must conduct a particularized assessment of the purposes served by a law suspending a driver's license when tests show that he had been driving with a BAC exceeding a statutory maximum.

As an initial matter, the Supreme Court has made it clear that whether a sanction constitutes punishment is not to be determined from the defendant's perspective. *Halper, supra,* 490 U.S. at 447 n. 7, 109 S.Ct. at 1901 n. 7. "On the contrary, . . . for the defendant even remedial sanctions carry the sting of punishment." *Id.* In finding that the administrative license suspension was punishment, the circuit court below mentioned several times the extent to which a defendant's livelihood may depend upon driving or the importance of a driver's license to a defendant. While this may be true, and while a defendant surely feels the "sting of punishment" upon the suspension of his or her license, we are here concerned with inquiring whether the statute serves the purposes of "punishment" within the specialized meaning of the Fifth Amendment. And for those purposes, the defendant's personal viewpoint is not at issue.

The central question before us is whether this application of § 16-205.1 can "fairly" be said only to serve a non-punitive purpose. *See Kurth Ranch, supra,* ___ U.S. at ___, 114 S.Ct. at 1945, 1948; *Austin, supra,* ___ U.S. at ___, 113 S.Ct. at 2812; *Halper, supra,* 490 U.S. at 448, 109 S.Ct. at 1901-02. After examining the Supreme Court's analysis in *Halper, Austin,* and *Kurth Ranch,* we believe our own analysis appropriately proceeds along three axes. First,

the statute at issue must be placed within historical context. We must examine prior uses of license suspension to determine whether they have been generally understood as punitive or non-punitive. Second, with this historical understanding in mind, we must turn to § 16-205.1 itself, and examine its language, structure, and, to some degree, the legislature's intent. As a result of this examination, we must determine whether § 16-205.1 evidences a purpose different from the historical understanding given to similar statutes. Finally, if § 16-205.1 serves both punitive and non-punitive purposes, we must determine whether the non-punitive purposes alone fairly justify the sanction imposed in this case.

1

We turn first to the common understanding of license revocations and the purposes that they serve. *Austin* and *Kurth Ranch* demonstrate the two different ways in which this historical analysis may frame our examination of the purposes served by § 16-205.1. In *Austin*, the Supreme Court reviewed in rem forfeitures under both English and American common law since the 18th Century to determine that forfeitures have historically been recognized as punishment. *Austin, supra*, ___ U.S. at ___, 113 S.Ct. at 2806-10. Then, finding "nothing in these provisions or their legislative history to contradict the historical understanding of forfeiture as punishment," the Court concluded that the provisions at issue could only be explained as serving, at least in part, a punitive purpose. *Id.* at ___, ___, 113 S.Ct. at 2810, 2813.

In *Kurth Ranch*, the Court approached the same question from the opposite direction. The Court first noted that taxes are typically designed to raise revenue rather than to serve punitive goals: "Whereas fines, penalties, and forfeitures are readily characterized as sanctions, taxes are typically different because they are usually motivated by revenue-raising rather than punitive purposes." *Kurth Ranch, supra*, ___ U.S. at ___, 114 S.Ct. at 1946. The Court then proceeded to delineate the differences between the "drug tax" and typical, non-punitive taxes, and concluded that "[t]aken as a whole, this drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." *Id.* at ___, 114 S.Ct. at 1948. Taken together, *Austin* and *Kurth Ranch* demonstrate that § 16-205.1 should be presumed to serve the purposes generally served by license suspensions unless the section is different from other license suspensions in some way that negates this presumption.[1]

We find that license suspensions generally serve remedial purposes. This conclusion is drawn from the purposes served by licensing systems themselves, i.e. to protect the public from unscrupulous or unskilled operators who would otherwise engage in the licensed activity.

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[1] In *Halper*, the Court did not directly address the historical or general purposes served by civil fines. The Court, however, did review prior cases that found that civil fines serve remedial purposes. *See Halper, supra*, 490 U.S. at 442-46, 109 S.Ct. at 1897-1901 (reviewing, in particular, *Helvering v. Mitchell*, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938) and *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943)).

For example, Maryland requires a license before practicing any one of a wide range of professions in which there is potential to cause injury to consumers through negligence or malfeasance. *See, e.g.*, Md.Code (1989, 1995 Repl.) §§ 2-301, 3-302, 4-301, 5-301, 6-301, 7-301, 9-301, 10-206, 11-401, 12-301, 13-301, 14-301, 15-301, 16-301, 17-301 of the Business Occupations & Professions Article. Similarly, a license or certificate of inspection must be procured before operating certain types of businesses. *See, e.g.*, Md.Code (1992, 1994 Supp.) §§ 3-401, 7-301, 9-301, 12-201 of the Business Regulation Article (requiring inspection certificate or license to operate amusement attraction, collection agency, employment agency, or pawn shop).

To ensure a licensee's capability, a licensee must typically meet certain standards before obtaining a license, such as achieving a certain level of education or passing an examination. *See, e.g.*, § 3-303 of the Business Occupations & Professions Article (requiring both education and examination before obtaining an architect's license). To ensure that the public is protected, licensing systems also typically require licensees to meet certain standards of conduct, and a license may typically be suspended or revoked when a licensee acts improperly. *See, e.g.*, § 4-314(a) of the Business Occupations & Professions Article (providing for denial of license to barber, reprimand of licensee, or suspension or revocation of license to barber if licensee uses license fraudulently, is incompetent, is habitually intoxicated, or fails to meet sanitary standards).

From the licensee's perspective, it is certainly true that suspension or revocation of a license may feel like

"punishment." A licensing system's ultimate goal, however, is to prevent unscrupulous or incompetent persons from engaging in the licensed activity. To this end, revocation or suspension of a license clearly prevents a wrongdoer from further engaging in the licensed activity, at least temporarily.[2]

Both our own cases and those from other courts support this conclusion. For example, we have consistently found that disbarment proceedings against an attorney guilty of misconduct are not conducted to punish the attorney but to protect the public from attorneys who are not fit to practice. *See Maryland St. Bar Ass'n v. Sugarman*, 273 Md. 306, 313-18, 329 A.2d 1 (1974), cert. denied, 420 U.S. 974, 95 S.Ct. 1397, 43 L.Ed.2d 654 (1975) (tracing history of this rule back to Lord Mansfield of the House of Lords); *Maryland State Bar Ass'n v. Frank*, 272 Md. 528, 535, 325 A.2d 718 (1974) (agreeing that, in disbarment proceedings against attorney, " 'the primary purpose is not to punish an offender; it is protect the public against members of the bar who are unworthy of the trust

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[2] The revocation of a license may seem more obviously remedial than a license suspension, since, once a license is revoked, the unscrupulous operator is banned from the licensed activity indefinitely. A license suspension, on the other hand, only prevents the operator from engaging in the activity for a limited period of time. We do not believe, however, that the Constitution requires the legislature to impose the most severe sanction (and hence require the licensee to feel the sharpest "sting of punishment") before the legislature's actions can be justified as remedial in nature.

and confidence essential to the relationship of the attorney and client' ") (*quoting In re Pennica*, 36 N.J. 401, 177 A.2d 721, 730 (1962)).

Disciplinary proceedings for other professional licensees have been viewed in the same way. *See, e.g., Loui v. Board of Medical Examiners*, 78 Hawai'i 21, 889 P.2d 705, 709-13 (1995) (finding that one-year revocation of license to practice medicine was designed to protect public from unfit physicians and was not punishment under Double Jeopardy Clause); *Schillerstrom v. State*, 180 Ariz. 468, 885 P.2d 156, 158-59 (Ariz.App.1994) (finding that revocation of license to practice as chiropractor was not "punishment" because purpose of revocation was to protect public and maintain standards in profession).

In addition, we have concluded that suspension of a driver's license in at least one circumstance serves remedial goals, although the Double Jeopardy Clause was not at issue in that case. In *Rentals Unlimited v. Administrator*, 286 Md. 104, 405 A.2d 744 (1979), we found that a statute allowing the MVA to suspend the license and registration of any person against whom a foreign judgement has been rendered served

> the remedial purpose of protecting the public from the reckless operation of vehicles by financially irresponsible drivers by assuring that operators and owners of vehicles against whom judgements might be entered on account of negligent driving, are financially able to pay damages. . . . To accomplish that purpose fully, the MVA must be authorized to suspend the license and registration of any financially irresponsible vehicle owner or driver. . . .

Id. at 110, 405 A.2d 744. Other courts have similarly treated the suspension of a driver's license as a remedial measure. *See, e.g., Butler v. Dept. of Public Safety & Corr.*, 609 So.2d 790, 796 (La.1992) (concluding that "a driver's license suspension is a remedial measure which attempts to protect society from the hazards posed by drunk drivers by removing the driving privileges of those who have been convicted of driving while intoxicated"). In general, therefore, we find that procedures through which licenses are suspended or revoked have a remedial purpose: that of preventing, at least temporarily, a wrongdoer from engaging in an activity when there is reason to believe that they may perform the activity unsafely.

2

We next examine § 16-205.1 itself, to determine whether an administrative license suspension under this section demonstrates a purpose different from that served by license suspension proceedings in general. Jones raises four arguments based on the structure and legislative history of § 16-205.1 as to why this statute should be found to serve punitive purposes. First, Jones notes that the license suspension is conditioned upon the commission of a crime. Second, Jones notes that the statute provides no basis for concluding in every case that the driver is presently unsafe or that recidivism is likely. Third, Jones argues that the legislature intended § 16-205.1 to have a punitive effect when the section was passed. Finally, Jones argues that the maximum penalties imposed by § 16-205.1 are so high that the section must have a punitive purpose.

We find nothing in the language and structure of the statute itself to show that § 16-205.1 serves a purpose different from any other license suspension. The fact that the sanction imposed by § 16-205.1 is conditioned upon committing acts which also constitute a crime does not provide evidence that it serves a punitive purpose. In *Kurth Ranch*, the fact that "this so-called tax is conditioned on the commission of a crime" was significant in finding that the drug tax only served punitive goals. *Kurth Ranch, supra*, ___ U.S. at ___, 114 S.Ct. at 1947. However, this factor was significant because it differentiated the "drug tax" both from "taxes with a pure revenue-raising purpose" and "mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money." *Id.* In other words, since taxes are not typically imposed upon criminal activities, this factor provided evidence that the drug tax only served punitive purposes.

In contrast, license suspensions or revocations are commonly predicated upon activities that are also illegal. *See, e.g., Sugarman, supra*, 273 Md. at 313-18, 329 A.2d 1 (finding willful assistance in evasion of income taxes to be grounds for disbarment of attorney); *Frank, supra*, 272 Md. at 535, 325 A.2d 718 (finding attempted bribery to be grounds for disbarment of attorney); *see also Loui, supra*, 889 P.2d at 705 (finding kidnapping and attempted sexual abuse to be grounds for revocation of license to practice medicine); *Schillerstrom, supra*, 180 Ariz. at 470-71, 885 P.2d at 158-59 (finding submission of false bills to be grounds for revocation of chiropractor's license). Since revocation or suspension of a license often occurs when the licensee acts in some way harmful to the public, it

should not be surprising that the licensee's actions are sanctionable under the criminal justice system. This does not, however, mean that the license suspension seeks to "punish" the offender. When facts supporting a criminal sanction also reveal that allowing a licensee to keep his or her license would endanger the public, revocation or suspension of a license is fully in accord with a remedial purpose.

Jones's second argument, that § 16-205.1 is punitive because there is no basis for finding that Jones is an unsafe driver, is also without merit. Jones relies heavily upon *Motor Vehicle Admin. v. Mohler*, 318 Md. 219, 567 A.2d 929 (1990), where we found that a single conviction for driving while intoxicated did not justify a finding that a driver was "unsafe" within the meaning of § 16-206 of the Transportation Article. In that case, however, we also noted that "the statutory development shows that the legislature meant to attach distinct meanings to 'unsafe,' 'unfit,' and the two 'habitual categories' " in § 16-206. *Id.* at 227, 567 A.2d 929. The question before us now is not whether Jones is an "unsafe" driver within the meaning intended by the legislature for § 16-206. Rather, the question before us is whether § 16-205.1 fairly serves the purpose of removing drunk drivers from Maryland's roads.

Nothing in the Double Jeopardy Clause requires that a statute operate with any specific degree of particularity. For double jeopardy purposes, an inquiry is made into the statute's purpose, not its breadth. If the class of individuals who fail or refuse to take breath or blood tests have an increased probability of driving while intoxicated, § 16-205.1 can fairly be said to serve the remedial

purpose of maintaining safety on the public highways.[3] In finding that § 16-205.1 can fairly be said to serve this remedial purpose, we note that Jones was given probation before judgement for driving while intoxicated twice before he was stopped for driving while intoxicated in the instant case. As we see it, it is not unreasonable for the State to fear that drivers such as Jones may drive while intoxicated in the future.

In contrast to Jones's characterization of § 16-205.1, we think that this section and its application contain features consistent with a remedial purpose. If the defendant requests a hearing, the ALJ can in some circumstances modify the suspension period based upon the petitioner's need to drive for purposes of employment or alcohol treatment. The form used by the ALJ in making findings of fact at this hearing specifically notes that the ALJ must weigh "the adverse effect upon the petitioner's need to drive for employment or alcoholic prevention purposes versus the State's need to maintain safety on the public highways." Thus, the ALJ must specifically consider the remedial purpose behind § 16-205.1 in making the appropriate determination.

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[3] The sole issue before us is whether § 16-205.1 constitutes punishment under the Double Jeopardy Clause, as incorporated through the Fourteenth Amendment. Thus, we need not decide whether § 16-205.1 is overbroad under either the Due Process or Equal Protection Clauses of the Fourteenth Amendment, although we note that such a challenge is unlikely to succeed. *See, e.g., Illinois v. Batchelder*, 463 U.S. 1112, 103 S.Ct. 3513, 77 L.Ed.2d 1267 (1983) (upholding Illinois's implied consent law against a due process challenge).

The fact that the suspension period may only be modified for offenders who have suffered neither a license suspension nor a drunk driving conviction in the past five years is not indicative of a punitive purpose. One can equally view the availability of a modification period for such "first offenders" as an attempt to lessen the "sting of punishment" for the group of drivers who the legislature thought would be least dangerous if allowed to continue driving. Similarly, elimination of this modification period for recidivists is consistent with the remedial goal of keeping the more dangerous drivers off the roads. The terms of § 16-205.1 provide no indication that it serves punitive, as opposed to remedial, purposes.

There is no merit to Jones's contention that the legislature's intent and the severity of the sanction imposed by § 16-205.1 demonstrate that this section only serves punitive, rather than remedial, purposes. We note that the Supreme Court in *Kurth Ranch* examined these factors, but only with a qualification: "We begin by noting that neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax a form of punishment." *Kurth Ranch, supra,* ___ U.S. at ___, 114 S.Ct. at 1946. The Court, however, did note that "a high tax rate and deterrent purpose lend support to the characterization of the drug tax as punishment." *Id.* at ___, 114 S.Ct. at 1947. In this case, these factors at best support an argument that § 16-205.1 furthers both punitive and remedial goals.

Jones argues that the changes made to § 16-205.1 in 1989 demonstrate that the legislature intended the section to have punitive effect. Jones particularly notes that the 1989 revisions to § 16-205.1 included providing for longer

license suspensions and reducing the discretion of ALJs to modify the length of a suspension period. These changes, however, merely evidence a legislative intent to suspend more drivers who drive while intoxicated for longer periods of time. These features of § 16-205.1 do not indicate whether the suspensions were intended to punish the drivers or were intended to keep potentially dangerous drivers off the road for a longer period of time and with greater certainty. The changes cited by Jones are consistent with either a remedial or punitive purpose.

On the other hand, the State places undue reliance on previous statements from this Court about the purposes of the drunk driving laws. The State correctly notes that "[w]e have consistently recognized that the statutory provisions enacted to enforce the State's fight against drunken driving . . . were enacted for the protection of the public and not primarily for the protection of the accused." *Motor Vehicle Admin. v. Shrader*, 324 Md. 454, 464, 597 A.2d 939 (1991). The "protection of the public," however, may be advanced through the imposition of either remedial or punitive sanctions. In addition, our previous statements about the general purposes of the drunk driving laws in toto are of little help in determining the legislature's intent in enacting the specific provisions before us here. Our prior pronouncements on the general purposes of the drunk driving laws, therefore, are of little help.[4]

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[4] The dual nature of such pronouncements is amply demonstrated by *Willis v. State*, 302 Md. 363, 488 A.2d 171 (1985), where we noted that the General Assembly's goal in enacting the drunk driving laws was "to meet the considerable challenge

Turning to the legislative history itself, we find that it demonstrates that both punitive and remedial purposes motivated the legislators in enacting the amendments that created § 16-205.1's administrative per se license suspension provisions. In *Johnson v. State*, 95 Md.App. 561, 570, 622 A.2d 199 (1993), the Court of Special Appeals conducted the same examination of legislative intent that we conduct here, and determined that "the bill [enacting the current version of § 16-205.1] appears to have a two-pronged purpose – first, to deter effectively those who would drive drunk, and second to reduce fatalities caused by those drunk drivers who drive while awaiting criminal adjudication." We find no reason to disagree with this conclusion.

The administrative per se license suspension law was first proposed in 1988, after the General Assembly established a Task Force on Drunk and Drugged Driving because "[t]he problem of drunk and drugged driving is of continuing concern to the citizens of the State of Maryland." Joint Resolution No. 15 of the Acts of 1988, quoted in *Shrader, supra*, 324 Md. at 460, 597 A.2d 939. As we noted in *Shrader*, the goals with which this Task force was charged included:

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created by this problem by enacting a series of measures to rid our highways of the drunk driver menace." *Id.* at 369-70, 488 A.2d 171. The State used this language to support its contention that the drunk driving laws were remedial, but neglected to read the next sentence in this opinion, which notes that "[t]hese measures . . . are primarily designed to enhance the ability of prosecutors to deal effectively with the drunk driver problem." *Id.* at 370, 488 A.2d 171.

> (1) Examining methods of increasing the effectiveness of the remedies currently available for combatting drunk and drugged driving;
>
> (2) Examining remedies developed by other states and jurisdictions to deal with the problem of drunk and drugged drivers; [and]
>
> (3) Recommending changes and additions to current laws and regulations dealing with drunk and drugged drivers.

Id., quoted in Shrader, supra, 324 Md. at 460, 597 A.2d 939. As an initial matter, we note the emphasis on "remedies" in the Task Force's goals, although we cannot give much weight to the use of the word "remedy" by itself.

In an interim report issued in 1988, the Task Force recommended that an "administrative per se law" be enacted,

> which would provide "for the prompt suspension of the driver's license of an individual who, upon being detained by a police officer on suspicion of driving or attempting to drive while under the influence of alcohol or while intoxicated, either: 1) Refused to take a BAC [blood alcohol concentration] test; or 2) Submitted to the BAC test, and the results exceeded a statutorily defined limit." Task Force on Drunk and Drugged Driving, Interim Report to the General Assembly at 6 (1988).

Shrader, supra, 324 Md. at 460, 597 A.2d 939. As Jones correctly notes, the Task Force's Interim Report to the General Assembly emphasizes that the administrative suspension law "establishes an administrative process and penalty that is separate and distinct from any criminal process and penalty," that "the administrative process

generally provides a sure penalty," and that "proponents claim that administrative per se is an effective deterrent to drunk driving." Task Force on Drunk and Drugged Driving, Interim Report to the General Assembly at 11-12. This language supports finding some punitive intent in proposing the administrative per se license suspension law, although we place no greater reliance on the use of the word "penalty" here than we place on the use of the word "remedy" in the statement of the Task Force's goals.[5]

In *Shrader*, we outlined the steps taken by the General Assembly following the issuance of the Task Force's report:

> In 1989, the General Assembly enacted the administrative per se law recommended by the Task Force, rewriting § 16-205.1 of the Transportation Article to allow a person's driver's license to be promptly suspended for suspected drunken driving if the person refused a test for blood alcohol concentration. Ch. 284 of the Acts of 1989. The legislative history of Chapter 284 (House Bill 556) indicates that the General Assembly's desire for swift and certain action against drunk drivers was balanced with concern for the administrative needs of the MVA.

Shrader, supra, 324 Md. at 464, 597 A.2d 939. Jones notes that in hearings before the House Judiciary Committee on

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[5] As the Supreme Court noted in *Kurth Ranch*, the Court "recognized in *Halper* that a so-called civil 'penalty' may be remedial in character." *Kurth Ranch, supra*, ___ U.S. at ___, 114 S.Ct. at 1945.

House Bill 556, some witnesses testified as to the deterrent effects of the administrative license suspension law. The Court of Special Appeals quoted some of this same testimony in *Johnson, supra,* 95 Md.App. at 570, 622 A.2d 199, to support its conclusion that the administrative suspension law serves both remedial and punitive purposes.

In *Johnson,* the Court of Special Appeals also quoted from a report on House Bill 556 prepared by the Governor's Legislative Office titled "Positive Aspects of Administrative Per Se." This report noted the deterrent effect of the proposed law, but also noted that it could lead to a reduction in fatal crashes and other remedial results. This report discussed the remedial purposes served by the proposed law, noting that "[s]peedy [a]dministrative sanctions would help the offender to recognize the cause and effect relationship between the offense and the sanction that would otherwise be weakened by lengthy delays," that "[i]t takes drunk drivers off the roads and it would save lives," and that "[q]uick Administrative Hearings could identify an individual who may be a problem drinker and result in alcohol treatments sooner than the delays caused by the court trial." *Johnson, supra,* 95 Md.App. at 569-70, 622 A.2d 199.

Without ascribing overriding importance to any particular piece of legislative history, we conclude that it is most likely that the legislature had both remedial and punitive purposes in mind when it amended § 16-205.1 in 1989. In assessing the importance of these various indicia of legislative intent, we must not place too much emphasis upon the casual use of words such as "punish," "deter," or "remedy." The Supreme Court has not treated

the labels attached to a statute by the legislature as strong indicators of that statute's purpose. In *Kurth Ranch*, the Court characterized its use of such labels as follows:

> *Halper* thus decided that the legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character. We also recognized in *Halper* that a so-called civil "penalty" may be remedial in character if it merely reimburses the government for its actual costs arising from the defendant's criminal conduct.

Kurth Ranch, supra, ___ U.S. at ___, 114 S.Ct. at 1945. As used in *Kurth Ranch*, the purposes ascribed to a statute by the legislature are at best evidence of the purposes a statute may fairly be said to serve.[6]

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[6] In his concurrence to *Halper*, Justice Kennedy outlined the dangers that would result from relying too closely on the legislature to determine the purposes served by a particular statute:

> Today's holding, I would stress, constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding. . . . Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name.

Halper, supra, 490 U.S. at 453, 109 S.Ct. at 1904 (citations omitted). Although the use of legislative intent in *Kurth Ranch* makes it clear that we must give some weight to the legislature's ascribed purposes, we keep in mind that the ultimate goal is to determine what purposes the statute may fairly be said to serve, not simply the purposes that some legislators or commentators desired the statute to serve.

Our review of the legislative history of House Bill 556 leads us to conclude that two main goals motivated the legislature: the punitive goal of deterring future offenders and the remedial goal of removing suspected drunk drivers from the road. Therefore, although it is not possible to quantify how much weight should be given to the legislature's intent, it did generally intend that § 16-205.1 serve both remedial and punitive purposes.

Finally, we disagree with Jones's contention that the sanctions imposed by § 16-205.1 are sufficiently severe that they provide evidence that it imposes punishment. While in *Kurth Ranch,* the Supreme Court did use the severity of the sanction imposed by the "drug tax" as evidence that the tax was punitive, it noted that "[a] significant part of the assessment was more than eight times the drug's market value – a remarkably high tax." *Kurth Ranch, supra,* ___ U.S. at ___, 114 S.Ct. at 1946. Jones argues that "the license suspension penalty is devastating to many drivers."[7]

While this may be true, we are unable to find either the 45-day or one-year maximum suspensions provided by the statute to be "remarkably high." To the contrary,

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[7] We only examine the maximum potential punishment insofar as it may be relevant in discerning the purposes served by the statute as a whole. In making this examination, it is important to restate that whether a sanction constitutes punishment is not determined from the defendant's perspective because even remedial sanctions carry the "sting of punishment." *Halper, supra,* 490 U.S. at 447 n. 7, 109 S.Ct. at 1901 n. 7.

we agree with the Supreme Court of Ohio that the interests advanced in removing drunk drivers from the highways "are of such a nature and importance to society in general that the inconvenience occasioned by the temporary suspension of driving privileges pales by comparison." *City of Columbus v. Adams*, 10 Ohio St.3d 57, 461 N.E.2d 887, 890 (Ohio 1984).

3

Having determined (1) that license suspensions typically serve remedial purposes, (2) that § 16-205.1's language and structure are consistent with the remedial purpose of removing potentially dangerous drivers from the highways, and (3) that the legislature intended that § 16-205.1 serve both remedial and punitive purposes, we now consider whether the suspension of Jones's license can be justified solely by the remedial purposes served by the statute, or whether the suspension can only be explained if a portion of the license suspension is "punishment."

Jones argues that under *Kurth Ranch*, our inquiry must end with our finding that § 16-205.1 serves both punitive and remedial purposes because this finding mandates a conclusion that § 16-205.1 is "punishment" for purposes of the Double Jeopardy Clause. We disagree. In *Halper*, the Supreme Court examined a statute that served both punitive and remedial goals and determined that if the remedial goals by themselves justified the sanction imposed, then the statute did not impose a "punishment" for purposes of double jeopardy. *See Halper, supra*, 490 U.S. at 448-49, 109 S.Ct. at 1901-02. In

our opinion, *Kurth Ranch* and *Austin* have not altered the *Halper* test.

It is true that the Supreme Court did not apply the *Halper* test in *Kurth Ranch* and *Austin*. We believe that the *Halper* test was not used in these cases because no remedial justification was found sufficient to justify any application of the statutes at issue in those cases. In *Austin*, the Supreme Court rejected the government's arguments that the in rem forfeiture served remedial goals. *Austin, supra*, ___ U.S. at ___, 113 S.Ct. at 2811-12. The Court found that there was nothing criminal or dangerous in possessing the property that was seized, so the seizure removed no dangerous or illegal items from society. *Id.* In addition, there was no correlation between any penalty imposed under the statute and any damages incurred by the government or the cost of enforcing the law. *Id.*

The Court's treatment of the non-punitive justifications for Montana's drug tax in *Kurth Ranch* was similar. The Court rejected the argument that the tax served revenue-raising purposes because it was "too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment." *Kurth Ranch, supra*, ___ U.S. at ___, 114 S.Ct. ___ at 1948. Montana never asserted that the drug tax served the remedial goals of recouping damages or the costs of investigation or prosecution. *Id.* The Court's treatment of the asserted non-punitive justifications given in *Austin* and *Kurth Ranch* leads us to conclude that in those cases, the asserted non-punitive purposes were not sufficient to justify any application of the statutes at issue. In contrast, we have found that § 16-205.1 serves the legitimate remedial purpose of

removing potentially dangerous drivers from the Maryland highways.

Conducting the analysis laid out in *Halper*, we find that the remedial purpose of maintaining safety on the public highways amply justifies the maximum 45-day license suspension that § 16-205.1 may impose upon a driver who fails a blood or breath test. In reaching this conclusion, we note that the *Halper* analysis "will not be an exact pursuit" and that determining whether a sanction is justified by its underlying remedial purpose "inevitably involves an element of rough justice." *Halper, supra*, 490 U.S. at 449, 109 S.Ct. at 1902. It is for this reason that the Supreme Court in *Halper* declined to perform an exact balancing of the asserted remedial and punitive purposes served by the statute in that case. The Court simply asked whether the statute may be "fairly" said to be remedial, *id.* at 448, 109 S.Ct. at 1901-02, or whether the civil penalty bore a "rational relation" to the government's remedial goal. *Id.* at 449, 109 S.Ct. at 1902. It is also for this reason that the Court described *Halper* as "a rule for the rare case." Id. We do not find it unreasonable for the State to remove, for a 45-day period, the driver's license of someone who has failed a breath or blood test. The justification of keeping drunk drivers off the highways is sufficient to find a reasonable or "fair" connection between the remedial purpose and the length of the license suspension.

Finally, Jones argues that the question of whether the entire sanction is fairly justified solely by remedial purposes is a question of fact that must lie within the discretion of the trial court. In *Halper*, the Supreme Court left to the trial court "the discretion to determine on the basis of

such an accounting [of the government's damages and costs] the size of the civil sanction the Government may receive without crossing the line between remedy and punishment." *Halper, supra*, 490 U.S. at 449, 109 S.Ct. at 1902. Such an approach, however, is not necessary here. *Halper* dealt with a potentially open-ended sanction and a remedial purpose resting upon underlying factual questions that will differ in each case: i.e., the expenditures and damages suffered by the government as a result of each false claim. *See id.* In contrast, § 16-205.1 provides upper limits to the suspension period and its remedial justification is the State's interest in maintaining safety on the highways. This justification will not vary from case to case, as would a calculation of damages.

We find that no factual issue is presented for which we must remand or defer to the trial court. Because the maximum 45-day suspension that could have been imposed upon Jones can be justified solely by § 16-205.1's remedial purposes, the ALJ could not have issued any sanction against Jones that would constitute "punishment" for double jeopardy purposes. As a result, there was no factual finding for the trial court to make with respect to the remedial purposes justifying § 16-205.1.

III

Nor is Jones's prosecution for driving while intoxicated barred by Maryland's common-law prohibition against double jeopardy. It is true that under Maryland's common law a defendant cannot be "put in jeopardy again for the same offense – in jeopardy of being convicted of a crime for which he had been acquitted; in

jeopardy of being twice convicted and punished for the same crime." *Gianiny v. State*, 320 Md. 337, 347, 577 A.2d 795 (1990); *see State v. Griffiths*, 338 Md. 485, 489, 659 A.2d 876 (1995). We need not decide, however, whether Maryland's common law contains a double-punishment analysis similar to that used in *Halper*, *Kurth Ranch*, and *Austin*.

It is unnecessary to decide that question at this time because Maryland's double jeopardy protection can be overridden by statute. "The rule against double jeopardy in Maryland is not established by the Constitution of the State but derives from the common law. The rule may be amended by the Legislature and a statute which is inconsistent with its common law scope and effect will prevail." *Ford v. State*, 237 Md. 266, 269, 205 A.2d 809 (1965). Thus, if we accepted Jones's assertion that the legislature intended to punish him under § 16-205.1, we would be constrained to find that the statute overruled the common-law double jeopardy protection, if any, to the extent of § 16-205.1's operation.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED; CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY RESPONDENT.

APPENDIX B

MANDATE

COURT OF APPEALS OF MARYLAND
SEPTEMBER TERM, 1995

NO. 42

STATE OF MARYLAND

-vs-

ERNEST JONES, JR.

Certiorari to the Circuit Court for Montgomery County

October 16, 1995 – Judgment of the Circuit Court for Montgomery County reversed; case remanded to that Court for further proceedings consistent with this opinion: costs to be paid by respondent. Opinion by Murphy, C.J.

STATEMENT OF COSTS:

In Circuit Court:

Record
Stenographer's Costs

In Court of Appeals:

Petition Filing Fee	$ 50.00
Printing Brief for Appellant	340.80
Portion of Record Extract – Appellant ..	
Reply Brief	81.60
Appearance Fee – Appellant.....	10.00
Filing Fee of Appeal (Court of Special Appeals)	
Printing Brief for Appellee	278.40
Portion of Record Exract [sic] – Appellee	
Appearance Fee – Appellee	10.00
	$ 770.80

STATE OF MARYLAND, ss:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals this fifteenth day of November, 1995.

/s/ Alexander L. Cummings

Clerk of the Court of Appeals of Maryland

Costs shown on this Mandate are to be settled between counsel and *NOT THROUGH THIS OFFICE.*

APPENDIX C

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF ADMINISTRATIVE LAW JUDGE

NAME: Ernest Patterson Jones, Jr.
SOUNDEX: J520-234-676-450
LOCATION: LG-A-MVA 8/31/94
CASE #: 94-015901

FINDINGS OF FACT

After considering the evidence and testimony presented in this case, I find by a preponderance of the evidence the following facts:

1) The police officer who stopped or detained Petitioner had reasonable grounds to believe that Petitioner was driving or attempting to drive a motor vehicle while intoxicated or under the influence of alcohol, drugs, a controlled dangerous substance, or any combination of the aforementioned, or in violation of an alcohol restriction or in violation of MD. TRANSP. CODE ANN. § 16-813 based on the following:

He was driving his vehicle behind & closed shopping center at 12:39 A.M.

2) There was evidence of the use of alcohol, drugs, controlled dangerous substances,or any combination of the aforementioned based on the following:

strong odor of alcohol & failed to perform field sobriety tests.

	YES	NO
3) The officer fully advised the Petitioner of the administrative sanctions to be imposed	x	___
4) The officer requested that the Petitioner take a test as defined in MD TRANSP. CODE ANN. § 16-205.1(a)(1)(iii)	x	___
5) The Petitioner drove or attempted to drive a motor vehicle and took the test as requested, indicating an alcohol concentration of 0.27 grams of alcohol [per 210 liters of breath] [per 100 milliliters of blood] at the time of testing	x	___
6) The Petitioner refused to take the test:	___	x
7) The Petitioner was driving a commercial motor vehicle	___	x

OTHER FACTS [IF NEEDED]

Mr. Jones appeared. Notice was received. He was on 4-25-94 at 12:39 AM driving on private property used by the public in general. He has prior PBJs for DWI (1985) and DUI (1993)

CONCLUSIONS OF LAW

Based upon the foregoing, I conclude that Petitioner is subject to sanction pursuant to MD. TRANSP. CODE ANN. § 16-205.1

Based upon the foregoing, I conclude that Petitioner is not subject to sanction pursuant to MD. TRANSP. CODE ANN. § _____

MODIFICATION DETERMINATION

	YES	NO
APPLICABLE ONLY IF PETITIONER TOOK THE TEST. I have weighed the adverse effect upon the petitioner's need to drive for employment or alcoholic prevention purposes versus the State's need to maintain safety on the public highways.		
1) Petitioner has had a license suspended under MD. TRANSP. CODE ANN. § 16-205.1 in the past 5 years	___	x
2) Petitioner has been convicted under MD. TRANSP. CODE ANN. § 21-902 in the past 5 years	___	x
3) Petitioner needs a license for employment purposes	x	___
4) Petitioner needs a license to attend an alcoholic prevention or treatment program	x	___

DECISION

x Driving privilege suspended for ___ 45 days ___ 90 days ___ 120 days ___ 1 year ___ other 30 days

Any suspension imposed shall run ___ concurrent with ___ consecutive to any existing suspenstion [sic].

Any suspension imposed shall be retroactive to: ___

___ Above suspension is modified to a restricted license [see attached *License Restriction Order*]

x Above suspension is not modified

___ No suspension imposed

___ Other: _____

8-31-94 /s/ Donald L. Fratino
Date Administrative Law Judge

_____
Printed name of
Administrative Law Judge

APPEAL RIGHTS ON BACK
OAH-APS-1 (Revised 1994)

APPENDIX D

PERTINENT PORTIONS OF MARYLAND CODE ANN., TRANSPORTATION ARTICLE, § 16-205.1 (1992 REPL. VOL., 1994 CUM. SUPP.)

* * *

(a)(2) Any person who drives or attempts to drive a motor vehicle on a highway or on any private property that is used by the public in general in this State is deemed to have consented, subject to the provisions of Secs. 10-302 through 10-309, inclusive, of the Courts and Judicial Proceedings Article, to take a test if the person should be detained on suspicion of driving or attempting to drive while intoxicated, while under the influence of alcohol, while so far under the influence of any drug, any combination of drugs, or a combination of one or more drugs and alcohol that the person could not drive a vehicle safely, while under the influence of a controlled dangerous substance, in violation of an alcohol restriction, or in violation of Sec. 16-813 of this title.

(b)(1) Except as provided in subsection (c) of this section, a person may not be compelled to take a test. However, the detaining officer shall advise the person that, on receipt of a sworn statement from the officer that the person was so charged and refused to take a test, or was tested and the result indicated an alcohol concentration of 0.10 or more, the Administration shall:

(i) In the case of a person licensed under this title:

1. For a test result indicating an alcohol concentration of 0.10 or more at the time of testing:

A. For a first offense, suspend the driver's license for 45 days; or

B. For a second or subsequent offense, suspend the driver's license for 90 days; or

2. For a test refusal:

A. For a first offense, suspend the driver's license for 120 days; or

B. For a second or subsequent offense, suspend the driver's license for 1 year;

* * *

(3) If the person refuses to take the test or takes a test which results in an alcohol concentration of 0.10 or more at the time of testing, the police officer shall:

(i) Confiscate the person's driver's license issued by this State;

(ii) Acting on behalf of the Administration, personally serve an order of suspension on the person;

(iii) Issue a temporary license to drive;

(iv) Inform the person that the temporary license allows the person to continue driving for 45 days if the person is licensed under this title;

(v) Inform the person that:

1. The person has a right to request, at that time or within 10 days, a hearing to show cause why the driver's license should not be suspended concerning the refusal to take the test or for test results indicating an

alcohol concentration of 0.10 or more at the time of testing, and the hearing will be scheduled within 45 days; and

2. If a hearing request is not made at that time or within 10 days, but within 30 days the person requests a hearing, a hearing to show cause why the driver's license should not be suspended concerning the refusal to take the test or for test results indicating an alcohol concentration of 0.10 or more at the time of testing will be scheduled, but a request made after 10 days does not extend a temporary license issued by the police officer that allows the person to continue driving for 45 days;

(vi) Advise the person of the administrative sanctions that shall be imposed in the event of failure to request a hearing, failure to attend a requested hearing, or upon an adverse finding by the hearing officer; and

(vii) Within 72 hours after the issuance of the order of suspension, send any confiscated driver's license, copy of the suspension order, and a sworn statement to the Administration, that states:

1. The officer had reasonable grounds to believe that the person had been driving or attempting to drive a motor vehicle on a highway or on any private property that is used by the public in general in this State while intoxicated, while under the influence of alcohol, while so far under the influence of any drug, any combination of drugs, or a combination of one or more drugs and alcohol that the person could not drive a vehicle safely, while under the influence of a controlled dangerous substance, in violation of an alcohol restriction, or in violation of Sec. 16-813 of this title;

2. The person refused to take a test when requested by the police officer or the person submitted to the test which indicated an alcohol concentration of 0.10 or more at the time of testing; and

3. The person was fully advised of the administrative sanctions that shall be imposed, including the fact that a person who refuses to take the test is ineligible for modification of a suspension or issuance of a restrictive license.

* * *

(f)(1) Subject to the provisions of this subsection, at the time of, or within 30 days from the date of, the issuance of an order of suspension, a person may submit a written request for a hearing before an officer of the Administration if:

(i) The person is arrested for driving or attempting to drive a motor vehicle while intoxicated, while under the influence of alcohol, while so far under the influence of any drug, any combination of drugs, or a combination of one or more drugs and alcohol that the person could not drive a vehicle safely, while under the influence of a controlled dangerous substance, in violation of an alcohol restriction, or in violation of Sec. 16-813 of this title; and

(ii) 1. There is an alcohol concentration of 0.10 or more at the time of testing; or

2. The person refused to take a test.

(2) A request for a hearing made by mail shall be deemed to have been made on the date of the United States Postal Service postmark on the mail.

(3) If the driver's license has not been previously surrendered, the license must be surrendered at the time the request for a hearing is made.

(4) If a hearing request is not made at the time of or within 10 days after the issuance of the order of suspension, the Administration shall:

(i) Make the suspension order effective suspending the license:

1. For a test result indicating an alcohol concentration of 0.10 or more at the time of testing:

A. For a first offense, for 45 days; or

B. For a second or subsequent offense, for 90 days; or

2. For a test refusal:

A. For a first offense, for 120 days; or

B. For a second offense or subsequent offense, for 1 year;. . .

* * *

(5)(i) If the person requests a hearing at the time of or within 10 days after the issuance of the order of suspension and surrenders the driver's license or, if applicable, the person's commercial driver's license, the Administration shall set a hearing for a date within 30 days of the receipt of the request.

* * *

(7)(i) At a hearing under this section, the person has the rights described in Sec. 12-206 of this article, but at the hearing the only issues shall be:

1. Whether the police officer who stops or detains a person had reasonable grounds to believe the person was driving or attempting to drive while intoxicated, while under the influence of alcohol, while so far under the influence of any drug, any combination of drugs, or a combination of one or more drugs and alcohol that the person could not drive a vehicle safely, while under the influence of a controlled dangerous substance, in violation of an alcohol restriction, or in violation of Sec. 16-813 of this title;

2. Whether there was evidence of the use by the person of alcohol, any drug, any combination of drugs, a combination of one or more drugs and alcohol, or a controlled dangerous substance;

3. Whether the police officer requested a test after the person was fully advised of the administrative sanctions that shall be imposed, including the fact that a person who refuses to take the test is ineligible for modification of a suspension or issuance of a restrictive license;

4. Whether the person refused to take the test;

5. Whether the person drove or attempted to drive a motor vehicle while having an alcohol concentration of 0.10 or more at the time of testing; or

* * *

(8)(i) After a hearing, the Administration shall suspend the driver's license or privilege to drive of the person charged under subsection (b) or (c) of this section if:

1. The police officer who stopped or detained the person had reasonable grounds to believe the person was driving or attempting to drive while intoxicated, while under the influence of alcohol, while so far under the influence of any drug, any combination of drugs, or a combination of one or more drugs and alcohol that the person could not drive a vehicle safely, while under the influence of a controlled dangerous substance, in violation of an alcohol restriction, or in violation of Sec. 16-813 of this title;

2. There was evidence of the use by the person of alcohol, any drug, any combination of drugs, a combination of one or more drugs and alcohol, or a controlled dangerous substance;

3. The police officer requested a test after the person was fully advised of the administrative sanctions that shall be imposed, including the fact that a person who refuses to take the test is ineligible for modification of a suspension or issuance of a restrictive license; and

4. A. The person refused to take the test; or

B. A test to determine alcohol concentration was taken and the test result indicated an alcohol concentration of 0.10 or more at the time of testing.

* * *

(v) The suspension imposed shall be:

1. For a test result indicating an alcohol concentration of 0.10 or more at the time of testing:

A. For a first offense, a suspension for 45 days; or

B. For a second or subsequent offense, a suspension for 90 days; or

2. For a test refusal:

A. For a first offense, a suspension for 120 days; or

B. For a second or subsequent offense, a suspension for 1 year.

* * *

(k) Subject to Sec. 16-812(n) of this title, this section does not prohibit the imposition of further administrative sanctions if the person is convicted for any violation of the Maryland Vehicle Law arising out of the same occurrence.

(l)(1) The determination of any facts by the Administration is independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence.

(2) The disposition of those criminal charges may not affect any suspension imposed under this section.

* * *

(n)(1) The Administration may modify a suspension under this section or issue a restrictive license if:

(i) The licensee did not refuse to take a test;

(ii) The licensee has not had a license suspended under this section during the past 5 years;

(iii) The licensee has not been convicted under Sec. 21-902 of this article during the past 5 years; and

(iv) 1. The licensee is required to drive a motor vehicle in the course of employment;

2. The license is required for the purpose of attending an alcoholic prevention or treatment program; or

3. It finds that the licensee has no alternative means of transportation available to or from the licensee's place of employment and, without the license, the licensee's ability to earn a living would be severely impaired.

* * *

(3) If the licensee refused to take a test, the Administration may not modify a suspension under this section or issue a restrictive license.

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

No. 95-1131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ERNEST JONES, JR.,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the administrative suspension of a motorist's driver's license pose no double jeopardy bar to subsequent prosecution of the motorist for the crime of driving while intoxicated?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1131

ERNEST JONES, JR.,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

BRIEF IN OPPOSITION

Respondent, State of Maryland, respectfully requests that this Court deny the petition for writ of certiorari of Petitioner Ernest Jones, Jr.

OPINIONS BELOW

The reported opinion of the Court below, *State v. Jones*, 340 Md. 235, 666 A.2d 128 (1995), is reproduced as an appendix to the petition for writ of certiorari. (Pet. for Cert. App. 1a-35a).

The one-paragraph opinion of the Circuit Court for Montgomery County, Maryland, granting Petitioner's motion to dismiss, is reproduced in the Statement of the Case, *infra* at 3.

STATEMENT OF JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the petition for writ of certiorari.

STATEMENT OF THE CASE

On April 25, 1994, Petitioner Ernest Jones, Jr. was arrested on the charge of driving while intoxicated. (Pet. for Cert. App. 2a). He later consented to a breath test to determine his blood alcohol concentration (BAC), which showed his BAC to be .27. (*Id.*).

On August 31, 1994, an administrative law judge suspended Jones's license for 30 days, pursuant to Md. Code Ann., Transp. § 16-205.1 (1992 & Supp. 1994). (Pet. for Cert. App. 2a). On November 15, 1994, Jones was tried before the District Court of Maryland for Montgomery County. (Pet. for Cert. App. 3a). That court found Jones guilty of driving while intoxicated. (*Id.*).

On appeal to the Circuit Court for Montgomery County, Jones filed a motion to dismiss the prosecution, contending that double jeopardy principles precluded the

State's prosecuting him for the crime of driving while intoxicated following the administrative suspension of his driver's license. (*Id.*). After a hearing on the motion, the circuit court granted Jones's motion over the State's objection and dismissed the case. (*Id.*). The court ruled:

> Well, this comes at -- I have not had the opportunity obviously to sit and digest all of this. I think I know sufficiently about it just having read the authorities that you are talking about to know what the issue is, because I think it turns on something on which I have an idee fixe anyway and that is the question of punishment vel non for taking away a person's driver's license.
>
> You just happened to hit -- I do not know what other judges think about it. Maybe others do not have as strong a stance as I do.
>
> But in my view you are punishing somebody by taking away their driver's license for whatever length of period of time and therefore the motion is granted.

The State of Maryland petitioned the Court of Appeals of Maryland for issuance of a writ of certiorari to review the judgment of the circuit court. That court granted the petition and reversed the lower court's judgment. Guided by this Court's decisions of *United States v. Halper*, 490 U.S. 435 (1989), *Austin v. United States*, 113 S. Ct. 2801 (1993), and *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994), the Court of Appeals found no double jeopardy bar to the State's prosecuting Petitioner for the criminal charge of driving while intoxicated. (Pet. for Cert. App. 13a-34a). The court examined the statute in Maryland that provides for suspension of a driver's license when the driver either refuses to take a breath test

to determine the driver's blood alcohol concentration, or takes the test and fails it. (*Id.* 19a-28a). The court concluded that the statute is both remedial, in that it reflects the public welfare purpose of quickly removing drunk drivers from the roads, and punitive, in that it serves the goal of deterring future offenders. (*Id.* 30a). The court determined, however, that the sanction of a 30-day suspension of a driver's license is rationally related to the statute's remedial purpose. (*Id.* 31a-33a). Given that administrative license suspension does not meet the *Halper* test for punishment, the court concluded that there is no double jeopardy bar to the State's prosecution of Jones on the criminal charge of driving while intoxicated and remanded the case for trial on that charge. (*Id.* 33a-35a).

REASONS FOR DENYING THE WRIT

The issue presented in the instant petition—whether a 30-day administrative suspension of a driver's license is "punishment" that erects a double jeopardy bar to subsequent criminal prosecution for the same offense—is unworthy of certiorari review for any of three reasons: First, this Court has recently denied a petition for writ of certiorari presenting the identical issue. Second, the Maryland Court of Appeals correctly applied this Court's double jeopardy precedent to conclude that administrative license suspension is not punishment for double jeopardy purposes. Third, virtually every court that has decided this issue is in accord with the decision of this case. There is, then, no conflict among the lower courts requiring resolution by this Court.

I.

THIS COURT HAS RECENTLY DENIED REVIEW ON THE EXACT ISSUE RAISED BY THIS PETITION.

Just three weeks ago, this Court refused to grant certiorari review on precisely the issue raised by the instant petition. *See Cossey v. Louisiana*, (La. Ct. App. 3d Cir. May 4, 1995), *cert. denied*, 64 U.S.L.W. 3498 (U.S. Jan. 22, 1996) (No. 95-822). Petitioner presents no arguments that suggest his petition should be decided any differently. Moreover, ten days before denying review in *Cossey*, this Court granted review in two cases that present the related question whether civil forfeiture of property involved in illegal drug activity is punishment for double jeopardy purposes. *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3477 (U.S. Jan. 12, 1996) (No. 95-345); *United States v. $405,089.23*, 33 F.3d 1210 (9th Cir. 1994), *cert. granted*, 64 U.S.L.W. 3477 (U.S. Jan. 12, 1996) (No. 95-346). However confused the lower federal and state courts might be with respect to the issues presented by *Ursery* and *$405,089.23*, there is no confusion among the lower courts in deciding the far easier question of the double jeopardy implications of administrative license suspensions. See part III, *infra*.

II.

THE COURT OF APPEALS OF MARYLAND CORRECTLY APPLIED THIS COURT'S DOUBLE JEOPARDY PRECEDENT.

In *United States v. Halper*, 490 U.S. 435, 440 (1989), this Court held that a civil sanction, notwithstanding its label as "civil," may nonetheless constitute punishment for double jeopardy purposes. Whether a sanction is punishment for double jeopardy purposes can only be determined by "assessing the character of the actual sanctions imposed on the individual by the machinery of the State." *Id.* at 447. In *Halper*, this Court set forth the test for determining if a civil sanction constitutes punishment for double jeopardy purposes:

> [U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution.

Id. at 448-49 (emphasis added). The Court emphasized that the determination of whether a sanction is punishment insofar as double jeopardy is concerned focuses on the purpose of the sanction, not on its incidental effect upon the defendant. On this point this Court stated: "This is not to say that whether a sanction constitutes punishment must be determined from the defendant's perspective. On the contrary, our cases have acknowledged that for the defendant even remedial sanctions carry the sting of punishment." 490 U.S. at 477 n.7. The Court cautioned

that only rarely would a civil sanction be deemed punishment under its tests, saying: "What we announce now is a rule for the *rare case*, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449 (emphasis supplied).

Two years ago, in *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994), the Court was confronted with the question whether the Double Jeopardy Clause was violated by Montana's attempt to collect a tax on illegal drugs following a criminal conviction for possession of those drugs. The Court found the *Halper* test unworkable for determining whether a *tax*, as opposed to some other form of civil sanction, constituted punishment for double jeopardy purposes: "[Revenue generating] tax statutes serve a purpose quite different from civil penalties, and *Halper*'s method of determining whether the exaction was remedial or punitive simply does not work in the case of a tax statute." *Id.* at 1948 (internal quotation marks and citation omitted). Nothing in *Kurth Ranch*, however, altered the basic tenet that no civil sanction, whether it be a forfeiture, fine, or tax, will be deemed punishment for double jeopardy purpose unless "the clearest proof" demonstrates that it has lost its remedial or revenue-generating characteristics and become *solely* punitive in "purpose and effect." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984).

The Court of Appeals of Maryland looked to *Halper* and *Kurth Ranch*, as well as the Court's decision in *Austin v. United States*, 113 S. Ct. 2801 (1993), as informing the double jeopardy analysis, and determined that the 30-day

suspension of a driver's license is not punishment. The Court examined the statute that provides for this administrative sanction—Maryland's so-called "implied consent law"—and concluded that one of its goals was remedial, *i.e.*, to remove drunk drivers from the highways. (Pet. for Cert. App. 30a). This conclusion not only squares with the statute's language and history, but is consistent with this Court's comments regarding a similar statute. *See Mackey v. Montrym*, 443 U.S. 1, 18 (1979) (upholding, as against a due process challenge, a Massachusetts statute that mandates suspension of a driver's license for refusal to take a breath analysis test, and pointing out that the Commonwealth's interest in public safety is substantially served by, among other things, promptly removing drunk drivers from the road). The Court of Appeals of Maryland did note that the statute also has the purpose of deterring drunk drivers, but found that the sanction of license suspension is rationally related to the statute's remedial purpose. From this, it was a simple step for the court to hold that, under *Halper*, license suspension is nonpunitive and thus poses no double jeopardy bar to criminal prosecution.

This result is no doubt correct and in complete accord with the Court's cases. No further examination of the issue is warranted.

III.

THE LOWER COURTS ARE VIRTUALLY UNANIMOUS IN HOLDING THAT ADMINISTRATIVE SUSPENSION OF A DRIVER'S LICENSE IS NOT PUNISHMENT FOR DOUBLE JEOPARDY PURPOSES.

Numerous lower courts have had recent occasion to address the issue presented by this petition. With but a single exception—one intermediate appellate court in Ohio—every court has concluded that administrative suspension of a driver's license is not punishment, as that term is used in double jeopardy parlance.

As did the Maryland Court of Appeals in this case, these courts reason that statutory schemes providing for license suspension or revocation as the result of refusing to take or failing a blood alcohol test are primarily remedial, and that the sanction is both rationally related and not overwhelmingly disproportionate to the government's public safety interest. *See, e.g., State v. Nichols*, 819 P.2d 995, 998-1000 (Ariz. App. 1991) (applying *Halper* test and concluding that administrative suspension of driver's license, even if incidentally punitive, is not punishment for double jeopardy purposes and does not bar State from prosecuting driver for drunken driving); *State v. Murray*, 644 So. 2d 533, 535 (Fla. App. 1994) (finding no double jeopardy violation in criminal prosecution following administrative suspension of license; purpose of suspension is regulatory, not punitive); *Butler v. Dept. of Public Safety and Corrections*, 609 So. 2d 790, 795-96 (La. 1992) (holding that "license suspension is a remedial measure which attempts to

protect society from the hazards posed by drunk drivers by removing [their] driving privileges."); *State v. Strong*, 605 A.2d 510, 513 (Vt. 1992) (holding that an administrative license suspension has a rational remedial purpose of protecting public safety). *Accord State v. Maze*, 825 P.2d 1169 (Kan. App. 1992); *Transportation Cabinet v. Feige*, 889 S.W.2d 52 (Ky. App. 1994); *Rushworth v. Registrar of Motor Vehicles*, 596 N.E.2d 340 (Mass. 1992).

Virtually every appellate court to decide this issue since *Kurth Ranch* has rejected any suggestion that it changed the *Halper* double jeopardy analysis for non-tax sanctions. *See, e.g., Snow v. Superior Court of Arizona*, 903 P.2d 628, 634 (Ariz. App. 1995) (declaring that *Halper* test remains unchanged by *Kurth Ranch*, and reaffirming that double jeopardy is not violated by prosecuting defendant on drunk driving charge); *Davidson v. Mackinson*, 656 So. 2d 223, 224-25 (Fla. App. 1995) (finding no double jeopardy bar to prosecution following administrative revocation of driver's license, and commenting that, although loss of license may be painful, primary purpose of administrative sanction is to promote public safety); *Jackson v. State*, 462 S.E.2d 802, 803 (Ga. App. 1995) (administrative license suspension is reasonably related and not disproportionate to State's remedial purpose); *State v. Higa*, 897 P.2d 928, 933-34 (Haw. 1995) (applying "broader principles of *Halper*" to conclude that license revocation proceedings "serve legitimate, nonpunitive, and purely remedial functions"); *State v. Savard*, 659 A.2d 1265, 1267-68 (Me. 1995) (applying *Halper* to conclude that license suspension is not punishment); *Luk v. Commonwealth*, 658 N.E.2d 664, 668-73 (Mass. 1995) (same); *State v. Hanson*, 532 N.W.2d 598, 602 (Minn. 1995) (rejecting the defense claim that *Austin* and *Kurth*

Ranch changed *Halper* test, and holding that, under *Halper*, administrative license revocation is remedial because it "is certainly not 'overwhelmingly disproportionate' to the public safety interest at stake."); *State v. Cassady*, 662 A.2d 955, 958 (N.H. 1995) (license revocation not punishment for double jeopardy purposes); *State v. Zimmerman*, 539 N.W.2d 49, 55-56 (N.D. 1995) (same); *State v. Miller*, No. 2-94-32, 1995 WL 275770 at *2-3 (Ohio App. May 12, 1995) (unpublished) (citing both *Halper* and *Kurth Ranch* and holding that administrative license suspension is remedial in nature and does not constitute punishment under the Double Jeopardy Clause); *Tench v. Commonwealth*, 462 S.E.2d 922, 924-25 (Va. App. 1995) (same). *See also State v. Zerkel*, 900 P.2d 744, 758 (Alaska App. 1995) (rejecting *Halper* analysis, but, in applying *Austin* and *Kurth Ranch*, holding that Alaska's administrative license suspension scheme is not punishment for double jeopardy purposes).[1]

In short, the lower courts are not remotely in conflict on this issue, but—almost to the last—have had no difficulty applying this Court's precedent on the subject.

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[1] The only decision that reaches the contrary conclusion comes from the intermediate appellate court of the Seventh District of Ohio, *State v. Gustafson*, No. 94 C.A. 232, 1995 WL 387619 (Ohio App. June 27, 1995) (unpublished). The court there, relying in part on an Arizona municipal court decision which has since been effectively overruled by the Arizona Court of Appeals decision in *Snow v. Superior Court of Arizona*, cited *supra*, concluded that an administrative suspension of a driver's license is punishment that bars a subsequent criminal prosecution on charges based on the same act. *State v. Miller*, cited *supra*, is from the Third District of Ohio, and reaches the opposite conclusion.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the petition for writ of certiorari filed herein be denied.

Respectfully submitted,

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